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## THE AGGREGATE INTEREST IN SHARED RESPECT AND HUMAN RIGHTS: THE HARMONIZATION OF PUBLIC ORDER AND CIVIC ORDER\*†

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In its most fundamental sense, respect may be defined as an interrelation among individual human beings in which they reciprocally honor each other's freedom of choice about participation in the value processes of the world community and its component parts. The central demand amidst all the rising common demands of peoples about the world today for the better clarification and securing of human rights would appear to be that of the individual for respect in this sense. The culminating achievement for a community that aspires to honor these demands and better to secure human rights may be described as that of a public and civic order in which individuals are subjected to the least possible coercion, from either public or private sources, in the making of their choices about participation in the community's various value processes.

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In previous studies we have explored the increasing protection that the global community seeks to afford individuals in their claims for a fundamental freedom of choice, for an effective equality of opportunity, and for distinctive recognition of pre-eminent contribution to common interest.<sup>1</sup> The tremendous emphasis that our contemporary society gives to the honoring of claims by individuals for these particular respect outcomes cannot, however, be permitted to blind us to the fact that every claim by individuals must be evaluated, by authoritative decision-makers and others, in

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1. We have defined "respect" in these terms:

In the fundamental sense with which we are here concerned, respect is defined as an interrelation among individual human beings in which they reciprocally recognize and honor each others' freedom of choice about participation in the value processes of the world community or any of its component parts. Respect includes not only the perspectives or perceptions of worth by which the individual is characterized by himself and others, but also the translation of these perspectives into the operative facts of social process. The relevant perspectives and operations extend to all the different values sought in social process and to the many distinctive institutional facilitations and deprivations by which freedom of choice is affected.

In more precise specification, respect may be said to entail four particular outcomes:

- 1) a fundamental freedom of choice for all individuals regarding participation in all value processes;
- 2) an equality of opportunity for all individuals to have experiences that enable them to enjoy the widest range of effective choice in their interactions with others and to participate in all value processes in accordance with capability, that is, without discrimination for reasons irrelevant to capability;
- 3) additional rewards in deference to individuals who make preeminent contribution to common interests; and
- 4) an aggregate pattern of social interactions in which all individuals are protected in the utmost freedom of choice and subjected to the least possible governmental and private coercion.

McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. 919, 920-21 (1975) [hereinafter cited as *The Protection of Respect*].

For further development, see McDougal, Lasswell, & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, SO. ILL. U.L.J. 151 (1976); McDougal, Lasswell, & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975) [hereinafter cited as *Human Rights for Women*]; McDougal, Lasswell, & Chen, *Non-Conforming Political Opinion and Human Rights: Transnational Protection against Discrimination*, 2 YALE STUDIES OF WORLD PUBLIC ORDER 1 (1975); McDougal, Lasswell, & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. FLA. L. REV. 639 (1976); McDougal, Lasswell, & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976); McDougal, Lasswell, & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 MICH. L. REV. 865 (1976); *The Protection of Respect*, *supra*.

terms of the aggregate common interest.

By the aggregate common interest we refer to the greatest shaping and widest sharing, not only of respect, but of all the values of human dignity. The promotion of aggregate common interest requires an accommodation of the interests of any particular individual, in relation to respect or any other value, with those of other particular individuals and with the interests of all individuals in all other values.

The aggregate common interest need not be conceived as in antithesis to the individual interest.<sup>2</sup> The individual and society need not be considered as polar opposites. The aggregate interest may, however, be more than the sum total of particular individual interests, since an appropriate accommodation or integration can raise the level of value production ultimately available for all. In a properly functioning system of public order the interests of particular individuals are harmonized in a comprehensive process of shaping and sharing values which may enhance the quality of life for all.

The aggregate common interest includes both a comprehensive public order and a civic order. It encompasses the entire domain of both public decisions, constitutive and other, and private choices.<sup>3</sup> In the contemporary world of pluralistic and intimate interdependences, the aggregate common interest can be meaningfully and realistically postulated and achieved only in a mutually supportive integration of public order and civic order. By comprehensive public order we refer to the features of the social process which, if challenged, are established and maintained by effective power, authoritative or other, through the imposition of severe sanctions. Comprehensive public order thus includes both what we call constitutive decisions—the decisions that establish and main-

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2. The artificiality of the dichotomy in the individual versus society was sharply indicated by Judge Lauterpacht:

For it is clear that the distinction between the protection of the child and the protection of society is artificial. Both the laws relating to guardianship and those relating to protective upbringing are laws intended primarily for the protection of children and their interests. At the same time, the protection of children—through guardianship or protective upbringing—is pre-eminently in the interests of society. They are part of it—the most vulnerable and most in need of protection. All social laws are, in the last resort, laws for the protection of individuals; all laws for the protection of individuals are, in a true sense, social laws.

Guardianship of Infants Convention (1902) Case, [1958] I.C.J. 55, 85.

3. Though we contrapose choices and decisions, we recognize that the difference reflects merely a continuum in degree of severity of sanction. While decisions are severely sanctioned, choices are sustained by moderate or no sanction.

tain the process of authoritative decision—and the decisions which emerge from the constitutive process to regulate the shaping and sharing of all community values, such as wealth, enlightenment, well-being, and so on.<sup>4</sup> By civic order we refer to the features of social process that are established and maintained by recourse to relatively mild sanctions and that afford the individual person a maximum of autonomy, creativity and diversity in the making of private choices, with the least possible governmental or private coercion or interference.<sup>5</sup>

The boundaries between comprehensive public order and civic order exhibit a certain tension and are fluid and changing.<sup>6</sup> The difference between conventional meanings that are commonly accepted in a given setting and the functional distinctions that we adopt for purposes of valid comparison must be kept in mind. Prevailing expectations about the severity or mildness of actual or potential sanctions can be ascertained by means of contextual, empirical inquiry. It is important to note that what falls under the conventional label of government in some jurisdictions is not necessarily part of the public order. For instance, many community prescriptions are not expected to be, and are not, enforceable; many

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4. See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385-88 (1971).

5. The definition of civic order in terms both of choices maintained by mild sanction and of a maximum of autonomy in the making of private choices is designed to be self-reinforcing. When operationally defined, civic order refers to a social process in which choices are attended by a relatively small degree of expected or experienced deprivation (a minimum of coercion or constraint). All social interactions involve the application of indulgences and deprivations. Sanctions are the practices by which indulgences and deprivations are applied. Institutions labelled "governmental" may or may not maintain a monopoly of severe sanctions applied in the name of the community. Severe sanctions may in fact be applied by institutions labelled "private". For identifying choices made in the civic order, as contrasted with decisions made in the public order, it is necessary, therefore, both to pierce institutional labels for ascertaining functional realities and to consider the relative severity and mildness of sanctions. Civic order choices have the dimension of mildness in sanction, whatever the source of sanction. We do not hope or expect to operate in a social process in which choices can be free of all sanction. Autonomy connotes a wide range of choice, but not freedom from all sanction.

6. See notes 94-95 *infra* and accompanying text.

In the words of Theodore Lowi:

The phrase "private life and public order" expresses two different ways of looking at the same thing: society in its effort to provide and to survive. In the real world it is impossible to separate private from public spheres. Analytically a distinction must be made between them, but only the better to assess their interconnections in the real world. "Private life and public order" is a statement of intimate relationship.

*Introduction to PRIVATE LIFE AND PUBLIC ORDER* at vii (T. Lowi ed. 1968).

others involve only mild deprivations against offenders. On the other hand, many ecclesiastical, business and other activities, which are conventionally regarded as within the domain of civic order, may entail severe value consequences.

A major objective of contextual analysis is to exhibit value consequences within the full range of interaction in a dynamic social process. It is, hence, of far less consequence to draw lines in a continuing gradation of events than to make certain that the whole spectrum is examined. The entire continuum from public through civic order poses significant policy problems for the maintenance of human rights. The freedom of choice that can be maintained with regard to any particular value process is a function both of the character and functioning of the constitutive process and of the allocations of access to all value processes.

If appropriate respect relationships are to be achieved in the inclusive world community, or in any component community, a civic order must be able to interact vigorously with a public order that performs its essential tasks. An adequate civic order is obtainable under an effectively functioning constitutive process whose structure is compatible with human dignity values and whose output of public order decisions defend and fulfill these goals. Conversely, the scope and quality of the civic order directly affect the constitutive process achievable and the flow of public order decisions.

For the development of these themes we propose to deal in sequence with (A) claims relating to comprehensive public order, and (B) claims relating to the protection of civic order. Under each heading we will consider the factual background of problems, relevant policies, trends in past decision, the conditions affecting decision, and possible future alternatives.

#### A. CLAIMS RELATING TO COMPREHENSIVE PUBLIC ORDER

##### I. *Factual Background*

The claims relating to comprehensive public order are always complementary to the claims about more particular outcomes in relation to respect and other values. In a sense, the relevance of comprehensive public order has already been indicated in our discussions of the various claims about particular outcomes.<sup>7</sup> Thus, in various articles dealing with nondiscrimination we have noted the

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7. See note 1 *supra*.

emergence of a general norm forbidding discrimination through any group label irrelevant to individual capabilities, and our central focus has always been upon whether or not a differentiation based upon a particular group categorization has a reasonable basis in relation to common interest.<sup>8</sup> For purposes of clarity and emphasis, however, it may be worthwhile to reexamine the same factual settings with a more direct focus upon the aggregate common interest. The reasonableness of particular differentiations is best determined by reference to impacts upon both the comprehensive public order and the civic order which together constitute the whole of social process.

The specific events in social process with which we are concerned relate to incompatibilities in the demands of individuals and groups among themselves and in reference to more general claims on behalf of aggregate common interest. In a pluralistic society it is inescapable that people make competitive, and sometimes incompatible, demands for different values and that the demands of individuals for particular values are upon occasion incompatible with community security, whether that security be conceived in the minimal sense of restraining violence and coercion or in the optimum sense of maximizing position, potential and expectancy in the shaping and sharing of all values. The central point has been well made by Lauterpacht:

Whatever designation of absoluteness we give to the rights of man—whether we call them fundamental, inherent, natural, or inalienable—they cannot be absolute. For they have a meaning only in relation to man living in society under the shelter of the political organization of the State. Even his fundamental rights must be exercised with due regard to the rights of others and to the safety and the welfare of the State. Freedom of speech and opinion can be recognized and protected only if it is made use of in a manner consistent with the law of libel and with public peace. Personal liberty cannot be absolute. It is subject to restraints and sanctions which the criminal law imposes for the protection of other members of the community and the common good. Even freedom of religion is conditioned by similar limitations.<sup>9</sup>

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8. See, e.g., *Human Rights for Women*, *supra* note 1, at 507-09.

9. H. LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN* 183-84

It is this diversity and potential for incompatibility in the demands of individuals and groups that condition the omnipresent complementarity and ambiguity in general community prescriptions, whether about respect or other values. In a world of scarce resources and enormous variations in value demands, identifications and expectations, an appropriate accommodation of common interest is a continuing necessity. Despite all the realities of diversity, it is easily observable that all manner of effective working arrangements are continuously made and maintained, through authoritative decision and otherwise, in the pursuit and furtherance of common interest.

## II. *Basic Community Policies*

It is as important in relation to respect outcomes, as to other value outcomes, to recognize the critical need for, and to make appropriate provision for, the rational accommodation of any particular individual's rights with the comparable rights of others and with the aggregate common interest. The necessities for such accommodation are all pervasive in social process and embrace ordinary, noncrisis as well as crisis situations, in which the aggregate common interest is more intensely threatened.

It would not appear that new substantive policy criteria, beyond those specified in earlier discussion,<sup>10</sup> are required for guiding the necessary accommodations. The postulation of the basic goal values of human dignity, the more general preferences inherent in this postulation about the shaping and sharing of respect and other values, and the more general preferences about a constitutive process which both reflects and secures human dignity values—all these remain relevant.<sup>11</sup> It should not be difficult to formulate con-

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(1945) (footnote omitted).

For a detailed articulation of the necessity of accommodation, see I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969). As one author has stated: "To guarantee a liberty is to create an unliberty. It is to tell some people that they have a choice and others that they do not. It is to make a distinction between liberties. It is to say that some are more important than others." Frankel, *The Jurisprudence of Liberty*, 46 *MISS. L.J.* 561, 564 (1975). See generally Gorove, *The Protection of Human Rights in Constitutional Law*, in *LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION* 425 (J. Hazard & W. Wagner eds. 1974) [hereinafter cited as *LAW IN THE UNITED STATES*].

10. See note 1 *supra*.

11. See McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 *VA. J. INT'L L.* 387 (1974); *The Protection of Respect*, *supra* note 1, at 927-37.

tent principles for exploring different contexts in order to ascertain the potential impact upon basic preferences of different options in decision.<sup>12</sup> For evaluating decision options in situations of crisis, appropriate principles of necessity and proportionality have long been employed.<sup>13</sup> The underlying policy, in application of all particular principles, must of course be that of establishing a framework of community expectation and practice in which all people enjoy and exercise the utmost freedom of choice about participation in all value processes.

Similarly, the principles of procedure recommended for the application of any human rights prescription would appear equally appropriate in applications that require the accommodation of claims. It remains important to suspend judgment while exploring all features of the context, to confront the alternative versions of reality in the problem at hand, to pierce through the manifest claims about facts and policies to the genuine problems which the disinterested observer can identify, and to employ a wide range of intellectual skills—historical, scientific, developmental and inventive—in assaying the benefits and costs to fundamental policies of different options.<sup>14</sup>

The overall task is that of securing a flow of applications of human rights prescriptions which best protects the rights of individuals, while simultaneously promoting the aggregate common interest. The rights that can be secured for anyone in any particular instance are a function both of the values at stake and of many relevant conditioning factors in a dynamic context. Similarly, the importance of any particular value to the claimant and others is a function of the ever-changing context. Although some values may be more intensely demanded than others by community members, there can be no absolute hierarchy of importance among different values. What can ultimately be protected must differ from value to

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12. See M. McDUGAL, H. LASSWELL, & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* (1967); Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 *INQUIRY* 87 (No. 2 1958); Lasswell, *The Public Interest: Proposing Principles of Content and Procedure*, in *THE PUBLIC INTEREST* 54 (Friedrich ed. 1962) [hereinafter cited as *The Public Interest*]; McDougal, *supra* note 11, at 403-04.

13. See notes 47-50 *infra* and accompanying text. For application of the principles of necessity and proportionality in the macro-context of aggression and self-defense, see M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 121-260 (1961).

14. See M. McDUGAL, H. LASSWELL, & J. MILLER, *supra* note 12, at 65-77, 270-359; McDougal, *supra* note 11, at 404-05.



value, from problem to problem even in the same value process, and from context to context. The most important policy concern, as we have indicated elsewhere, must be that of developing a contextual method that effectively employs adequate principles of content and procedure both to facilitate close scrutiny of all the pertinent variables and to evaluate the consequences of alternative decisions.<sup>15</sup>

It may require especial vigilance to insure that the claim to integrate a common interest is not abused. Power elites notoriously often confuse their special interests in power and other values with the common interest of the community as a whole. It cannot be denied that the interests of the global community and of its component communities are often not fully realized in fact and that what is proffered as common interest is sometimes spurious. Nonetheless, the urgent need for improving the harmony of particular interests in the aggregate of protected interests can not rationally be denied or neglected.

### III. *Trends in Decision*

The human rights prescriptions which affect respect, like the demands they express and protect in a pluralistic society, are both complementary in form (in terms of the rights protected) and highly abstract in their particular formulations.<sup>16</sup> Fortunately, many prescriptions have explicitly recognized the necessity for accommodating particular interests with aggregate common interest in both ordinary and crisis situations. This recognition appears both in broad, general provisions and in the specification of particular values.

It would appear to make little difference in what form provision for accommodation is made, or that all provisions are repetitious and cumulative in effect. Since accommodation always requires connecting particular claims in reference to different values in contexts of expanding impact and interdependence, we conclude

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15. See note 12 *supra*; *The Protection of Respect*, *supra* note 1, at 929-31.

16. See McDougal, *supra* note 11, at 390. For a detailed development of the complementarity in legal principle in correspondence to complementarity in social process, see McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221 (H. Lasswell & H. Cleveland eds. 1962). See also M. COHEN, *REASON AND NATURE* 165-68 (1931); Cardozo, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 251, 252-70 (M. Hall ed. 1947).

that accommodations can rationally be made only in terms of the largest context and of impacts upon all values. Therefore, provisions that require the accommodation of any particular value outcome with other outcomes and with the aggregate common interest must of necessity go beyond any single value process and refer to all interacting processes in the larger community. Certainly, since the value "respect" is defined in terms of freedom of access to all values,<sup>17</sup> both the general provisions for accommodation which make explicit reference to many different values and the more particular provisions which focus primarily upon the necessities of accommodation in relation to some particular value inevitably affect the shaping and sharing of respect.

In brief exploration of how respect outcomes may be affected, it will be convenient to note, first, provisions for the accommodation of particular human rights with other human rights and the aggregate common interest, and, second, provisions for permissible derogations from some human rights in times of high crisis and intense threat to general community interest.

The explicit recognition of the necessity for rational accommodation, even in noncrisis situations, is admirably indicated in the Universal Declaration of Human Rights. After spelling out in serial detail the more important rights of the individual in its first twenty-seven Articles, the Universal Declaration concludes by devoting its last three Articles—28, 29, and 30—to expression of the kind of aggregate concern we recommend.

The overriding importance of the aggregate common interest is projected, in Article 28, in the most comprehensive terms:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.<sup>18</sup>

This brief provision but reflects the widely held view that, in the contemporary world of global interdependences, the human rights of the individual can be made meaningful and secure only by reference to the most inclusive context.

The inherent components of a comprehensive public order are articulated in Article 29:

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17. See note 1 *supra*.

18. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, art. 28, G.A. Res. 217, U.N. Doc. A/810, at 71, 76 (1948) [hereinafter cited as Universal Declaration].

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.<sup>19</sup>

The provision that "everyone has duties to the community" is an indication of the relativity of the rights to be accorded to the individual; rights and duties are, indeed, regarded as two sides of the same coin. The equal emphasis upon rights and duties is made even more pronounced in the American Declaration on the Rights and Duties of Man, which is divided into two chapters: the first dealing with "Rights," and the second with "Duties."<sup>20</sup> Paragraph 2 of Article 29 is a key provision in its insistence that there is a comprehensive public order in which appropriate particular accommodations of conflicting claims are to be made. It provides a broad framework within which any one particular value outcome is to be reconciled with all other relevant value outcomes, aggregate or particular, in an ever-changing community context.

Exemplifying its concern for accommodations which do not unnecessarily deprive the rights of individuals, the Universal Declaration, in Article 30, provides a final safeguard and reminder:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.<sup>21</sup>

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19. *Id.* art. 29, U.N. Doc. A/810, at 76-77.

20. American Declaration of the Rights and Duties of Man, Resolution XXX, adopted by the Ninth International Conference of American States, held at Bogota, Columbia, 30 Mar.—2 May 1948 [hereinafter cited as American Declaration], *Pan American Union, Final Act of the Ninth Conference of American States* 38-45 (1948), reprinted in *BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 187 (L. Sohn & T. Buergenthal eds. 1973) [hereinafter cited as *BASIC DOCUMENTS*].

21. Universal Declaration, *supra* note 18, art. 30, U.N. Doc. A/810, at 77.

In a complex world in which the rights of the individual can be affected by so many actors, official and other, in so many different ways, Article 30 serves as a significant admonition. Its message is simple and clear: the rights and freedoms protected are not to be diluted or destroyed under any pretext, even in the name of accommodation.<sup>22</sup>

This safeguarding theme, so manifest in the Universal Declaration, is reiterated in both Covenants on Human Rights. Thus, the International Covenant on Civil and Political Rights, in Article 5, provides:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.<sup>23</sup>

Similarly, the International Covenant on Economic, Social, and Cultural Rights, in Article 4, provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>24</sup>

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22. See N. ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 143 (1958).

23. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 5, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 53, U.N. Doc. A/6316 (1966) [hereinafter cited as *Covenant on Civil and Political Rights*].

24. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 4, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 50, U.N. Doc. A/6316 (1966) [hereinafter cited as *Covenant on Economic Rights*].

Article 5 further states:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.<sup>25</sup>

This same theme is given further expression in the regional human rights prescriptions. The European Convention on Human Rights states in Article 17:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>26</sup>

Article 18 of the European Convention further stipulates:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.<sup>27</sup>

The provisions in the American Convention on Human Rights are even more elaborate. Article 29 reads:

No provision of this Convention shall be interpreted as:

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25. *Id.* art. 5, 21 U.N. GAOR, Supp. (No. 16) at 50.

26. Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, art. 17, [1950] Europ. T.S. No. 5, 213 U.N.T.S. 221, 234 [hereinafter cited as European Convention].

27. *Id.* art. 18, 213 U.N.T.S. at 234. The case law and problems relating to accommodations and derogations in the context of the European Convention of Human Rights are offered in EUROPEAN COMMISSION OF HUMAN RIGHTS, CASE-LAW TOPICS, NO. 4: "HUMAN RIGHTS AND THEIR LIMITATIONS" (1973) [hereinafter cited as "HUMAN RIGHTS AND THEIR LIMITATIONS"].

- (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.<sup>28</sup>

Article 30 provides:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.<sup>29</sup>

And Article 32 states:

- 1. Every person has responsibilities to his family, his community, and mankind.
- 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.<sup>30</sup>

In addition to all these general provisions about accommodation, there are a host of more particular prescriptions, in relation to

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28. American Convention on Human Rights, signed Nov. 22, 1969, art. 29, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970), reprinted in 9 INT'L LEGAL MATERIALS 99, 110 (1970) [hereinafter cited as American Convention].

29. *Id.* art. 30, 9 INT'L LEGAL MATERIALS at 110.

30. *Id.* art. 32, 9 INT'L LEGAL MATERIALS at 110.

specific values, which affect the shaping and sharing of respect. Provisions which make explicit reference to respect itself, even in the more limited sense of "privacy," are infrequent. One example is found in the European Convention on Human Rights, which provides in Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>31</sup>

An excellent example of a particular provision in relation to another value which must affect respect, in its broadest sense, is found in the prescriptions concerning freedom of association. The International Covenant on Civil and Political Rights, in Article 22, provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as

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31. European Convention, *supra* note 26, art. 8, 213 U.N.T.S. at 230.

to prejudice, the guarantees provided for in that Convention.<sup>32</sup>

Comparable provisions are found in Article 11 of the European Convention on Human Rights<sup>33</sup> and Article 16 of the American Convention on Human Rights.<sup>34</sup>

Other particular provisions for accommodation, which inevitably affect respect, abound. The list includes:

(1) in relation to power: Articles 12(3), 13, 14(1) and 21 of the International Covenant on Civil and Political Rights (regarding freedom of movement and residence, freedom from expulsion, "a fair and public hearing," and freedom of assembly);<sup>35</sup> Articles 5(1), 6 and 11 of the European Convention on Human Rights (concerning "the right to liberty and security of person," "a fair and public hearing," and freedom of assembly);<sup>36</sup> Article 2 of the Fourth Protocol of the European Convention (regarding freedom of movement and residence);<sup>37</sup> and Articles 15 and 22 of the American Conven-

32. Covenant on Civil and Political Rights, *supra* note 23, art. 22, 21 U.N. GAOR, Supp. (No. 16) at 55.

33. Article 11 states:

1. Everyone has the right to . . . freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restriction on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

European Convention, *supra* note 26, art. 11, 213 U.N.T.S. at 232.

34. Article 16 provides:

1. Everyone shall have the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes.

2. Exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

American Convention, *supra* note 28, art. 16, 9 INT'L LEGAL MATERIALS at 106.

35. Covenant on Civil and Political Rights, *supra* note 23, arts. 12(3), 13, 14(1) and 21, 21 U.N. GAOR, Supp. (No. 16) at 54-55.

36. European Convention, *supra* note 26, arts. 5(1), 6 and 11, 213 U.N.T.S. at 226-32.

37. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 44 (11th ed. 1976) [hereinafter cited as COLLECTED TEXTS].



tion on Human Rights (concerning freedom of assembly and freedom of movement and residence);<sup>38</sup>

(2) in relation to enlightenment: Article 19(3) of the International Covenant on Civil and Political Rights (regarding freedom of expression);<sup>39</sup> Article 10 of the European Convention on Human Rights (regarding freedom of expression);<sup>40</sup> and Article 13 of the American Convention on Human Rights (concerning freedom of expression);<sup>41</sup>

(3) in relation to wealth: Article 1 of the First Protocol of the European Convention on Human Rights (regarding the right to property)<sup>42</sup> and Article 21 of the American Convention on Human Rights (regarding the right to property);<sup>43</sup>

(4) in relation to rectitude: Article 18(3) of the International Covenant on Civil and Political Rights (regarding "freedom to manifest one's religion and beliefs");<sup>44</sup> Article 9(2) of the European Convention on Human Rights (regarding "[f]reedom to manifest one's religion or beliefs");<sup>45</sup> and Article 12(3) of the American Convention on Human Rights (regarding "[f]reedom to manifest one's religion and beliefs").<sup>46</sup>

Provisions that authorize derogations from particular rights in times of high crisis, and which in consequence may affect the shaping and sharing of respect, are also found in all the major human rights conventions. The International Covenant on Civil and Political Rights, in Article 4, provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may

38. American Convention, *supra* note 28, arts. 15 and 22, 9 INT'L LEGAL MATERIALS at 106-08.

39. Covenant on Civil and Political Rights, *supra* note 23, art. 19(3), 21 U.N. GAOR, Supp. (No. 16) at 55.

40. European Convention, *supra* note 26, art. 10, 213 U.N.T.S. at 230.

41. American Convention, *supra* note 28, art. 13, 9 INT'L LEGAL MATERIALS at 105-06.

42. European Convention, *supra* note 26, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed Mar. 20, 1952, in European Convention, protocol no. 1, art. 1, 213 U.N.T.S. at 262.

43. American Convention, *supra* note 28, art. 21, 9 INT'L LEGAL MATERIALS at 107.

44. Covenant on Civil and Political Rights, *supra* note 23, art. 18(3), 21 U.N. GAOR, Supp. (No. 16) at 55.

45. European Convention, *supra* note 26, art. 9(2), 213 U.N.T.S. at 230.

46. American Convention, *supra* note 28, art. 12(3), 9 INT'L LEGAL MATERIALS at 105.

take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.<sup>47</sup>

The wording of the European Convention on Human Rights differs slightly. Article 15(1) reads:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.<sup>48</sup>

The American Convention on Human Rights, similarly, contains a derogation clause in Article 27, which reads in part:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law

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47. Covenant on Civil and Political Rights, *supra* note 23, art. 4, 21 U.N. GAOR, Supp. (No. 16) at 53.

48. European Convention, *supra* note 26, art. 15(1), 213 U.N.T.S. at 232.

and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.<sup>49</sup>

It will be noted that these prescriptions impose requirements of necessity and proportionality, the ascertainment of which must entail examination of very large factual contexts.<sup>50</sup>

It will be observed that all the prescriptions outlined above, whether providing for accommodation or authorizing derogation, have exhibited remarkable uniformity both in their emphasis upon aggregate common interest and in their itemization of particular important policies. The recurring terms of reference, in quick inventory, include: "meeting the just requirements of morality, public order and the general welfare in a democratic society;" "national security;" "public safety;" "public order (*ordre public*);" "the protection of public health;" "morals;" "the protection of the rights and freedoms of others;" "for the prevention of disorder or crime;" "the rights of others;" "the security of all;" "the just demands of the general welfare;" "in a democratic society;" "the economic well-being of the country;" "compelling reasons of national security;" "the interests of justice;" "the interest of juvenile persons;"

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49. American Convention, *supra* note 28, art. 27, 9 INT'L LEGAL MATERIALS at 109.

50. It may be observed that the intellectual difficulties in problems of accommodation and derogation are much the same, with the latter distinguishable only by the additional fact of alleged community crisis. For general discussion of the complexities of the problems of derogation and accommodation, see F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 165-70 (T. Opsahl & T. Ouchterlony eds. 1974); A. DEL RUSSO, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 123-28, 155-59 (1971); J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 245-50 (1969); F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 195-214 (1975); A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 112-39 (1963); Becket, *The Greek Case before the European Human Rights Commission*, 1 HUMAN RIGHTS 91 (1970); Buergenthal, *Proceedings against Greece under the European Convention of Human Rights*, 62 AM. J. INT'L L. 441 (1968); Coleman, *Greece and the Council of Europe: The International Legal Protection of Human Rights by the Political Process*, 2 ISRAEL Y.B. HUMAN RIGHTS 121 (1972); Daes, *Restrictions and Limitations on Human Rights*, in INT'L INST. OF HUMAN RIGHTS, 3 RENE CASSIN AMICORUM DISCIPULORUMQUE LIBER 79 (1971); LAW IN THE UNITED STATES, *supra* note 9; *Lawless v. Ireland (Merits)*, 4 Y.B. EUR. CONV. ON HUMAN RIGHTS 438 (1961); Morrison, *Margin of Appreciation in Human Rights Law*, 6 HUMAN RIGHTS J. 263 (1973); Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 103, 114-17 (A. Eide & A. Schou eds. 1968); Smith, *The European Convention on Human Rights and the Right of Derogation: A Solution to the Problem of Domestic Jurisdiction*, 11 HOW. L.J. 594 (1965); Van Boven, *Some Remarks on Special Problems Relating to Human Rights in Developing Countries*, 3 HUMAN RIGHTS J. 383, 391-92 (1970).

"public interest;" and "the public interest in a democratic society."

What has been conspicuously missing from this rich body of prescriptive statement has been detailed specification of the principles of application, especially of procedure, which might be employed to increase the possibility of making rational accommodations and derogations. Exhortations to secure the balanced protection of all values and to take aggregate common interest into account can scarcely be made effective without the specification of principles, at lower levels of abstraction, designed to facilitate the exploration of factual contexts and the assessment of the value benefits and costs of available options.

It is not adequate discharge of this particular intellectual responsibility to emphasize, as many of the prescriptions do, the importance of due process of law, in the sense that decisions about accommodation be taken in accordance with the law ("in accordance with the law," "determined by law," "prescribed by law," "in conformity with law"). This requirement for conformity with the law is of course designed to insure that decisions are taken within structures of authority and to minimize elements of arbitrariness in the course of decision.<sup>51</sup> The requirement of recourse to authoritative structures for decision, though necessary, is no effective substitute for the provision of appropriate intellectual tools.<sup>52</sup> It is remarkable that even the literature of human rights has made so little contribution to the development of useful principles of application, either of content or of procedure.

## B. CLAIMS RELATING TO CIVIC ORDER (INCLUDING PRIVACY)

### I. *Factual Background*

By civic order, as previously indicated, we refer to the features of social process that are cultivated and sustained by recourse to relatively mild rather than severe sanctions.<sup>53</sup> It is the domain of social process in which the individual person is freest from coercion, governmental or other, and in which a high degree of individual autonomy and creativity prevails. Civic order thus includes all of the processes and institutions of private choice, as distinguished from public decision.<sup>54</sup> The core reference of civic order

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51. See Daes, *supra* note 50, at 82-86.

52. See notes 11-15 *supra* and accompanying text.

53. See notes 4-6 *supra* and accompanying text.

54. See note 3 *supra*.

is, it may be reiterated, to freedom of choice for participation in each of the value processes. However, in contrast with the claims of particular individuals for a "fundamental freedom of choice in value participation," the claims with which we dealt under the first outcome of respect,<sup>55</sup> the focus here is upon a freedom of choice not involving immediate and particular public decision; our concern is for the larger flow of decision protecting aggregate patterns of freedom of choice for all individuals and groups. The distinctive reference of civic order is to the totality of freedom of choice achieved or achievable in a community.

Civic order, as we define it, includes "privacy," but we give a more limited reference to privacy. The term "privacy" is, in much contemporary usage, accorded a wide range of reference.<sup>56</sup> Sometimes it is employed as a functional equivalent to the "right to be let alone," with practically the same broad reference that we impute to civic order.<sup>57</sup> It appears more appropriate, however, to

55. See *The Protection of Respect*, *supra* note 1, at 937-1034.

56. Arthur R. Miller observes:

The concept of privacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different "rights," some of which are intertwined, others often seemingly unrelated or inconsistent.

A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 25 (1971) (footnote omitted). Similarly, Dixon has stated: "Few concepts . . . are more vague or less amenable to definition and structural treatment than privacy." Dixon, *The Griswold Penumbra: Constitution Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 199 (1965).

On the diversity of the concept of privacy, see Parker, *A Definition of Privacy*, 27 RUT. L. REV. 275 (1974). In addition to notes 58, 144, 169, 184, and 223 *infra*, see also REPORT OF THE COMMITTEE ON PRIVACY, CMND. NO. 5012, at 17-22, 327-28 (Comm. Print 1972) [hereinafter cited as THE YOUNGER REPORT]; CAN. DEP'T OF COM./DEP'T OF JUST., TASK FORCE, PRIVACY AND COMPUTERS 12-14 (1972) [hereinafter cited as PRIVACY AND COMPUTERS]; M. ERNST & A. SCHWARTZ, *PRIVACY: THE RIGHT TO BE LET ALONE* (1962); H. GROSS, *PRIVACY—ITS LEGAL PROTECTION* (1964); *PRIVACY (NOMOS XIII)*, J. Pennock & J. Chapman eds. 1971; UNITED STATES OFFICE OF SCIENCE AND TECHNOLOGY, *PRIVACY AND BEHAVIORAL RESEARCH* (1967); Christie, *The Right to Privacy and The Freedom to Know: A Comment on Professor Miller's The Assault on Privacy*, 119 U. PA. L. REV. 970 (1971); Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34 (1967); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693 (1972); Reubhausen & Brim, Jr., *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184 (1965); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281 (1966); Simmel, *Privacy*, 12 INT'L ENCYC. SOC. SCI. 480 (1968); *Symposium*, 4 COLUM. HUMAN RIGHTS L. REV. 1 (1972); *Symposium-Privacy*, 31 LAW & CONTEMP. PROB. 251 (1966); Wagner, *The Right of Privacy and its Limitations in the U.S.A.*, in *LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION* 491 (J. Hazard & W. Wagner eds. 1974).

57. The origin of the expression, "The right to be let alone," is attributed to Judge

restrict the reference of privacy to freedom of the individual in terms of the information that can be acquired and communicated by, and to, others about him.<sup>58</sup> So defined, the concept serves as an important component of the more comprehensive freedoms encompassed within a properly functioning civic order. Such restrictive usage may help to bring relevant policy considerations into sharper focus and to facilitate the contextual analysis essential to decision-making.

The aggregate patterns of civic order are of course comprised of the particular assertions of fundamental freedoms of choice by individuals in the different value processes. It may be recalled that we described these fundamental freedoms, in relation to values other than power, as follows:

in relation to enlightenment, the freedom to acquire, use, and communicate knowledge; in relation to well-being, the freedom to develop and maintain psychosomatic integrity and a healthy personality; in relation to wealth, freedom of contract and of access to goods and services; in relation to skill, the freedom to discover, mature, and exercise latent talents; in relation to affection, the freedom to establish and enjoy congenial personal relationships; and in relation to rectitude, freedom to form, maintain, and express norms of responsible conduct.<sup>59</sup>

From a global perspective, the achievement of a comprehensive civic order, in which the aggregate pattern of social interaction affords all individuals and groups a fundamental freedom of choice in the shaping and sharing of all values, is more aspiration than reality. In an interdependent yet divided world in which demands for the unity of humankind interplay with the practices of parochial

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Cooley. T. COOLEY, *THE LAW OF TORTS* 29 (2d ed. 1888). See notes 129-223 *infra* and accompanying text.

58. Such a restrictive reference is offered by Westin: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTIN, *PRIVACY AND FREEDOM* 7 (1968). Similarly, Arthur Miller writes: "[T]he basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him—a power that often is essential to maintaining social relationships and personal freedom." A. MILLER, *supra* note 56, at 25. In the words of Fried: "Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves." Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968).

59. *The Protection of Respect*, *supra* note 1, at 940.

fragmentation, continuing expectations of violence, external as well as internal, are widely shared by the elite and the rank and file alike.<sup>60</sup> Under "a global war system,"<sup>61</sup> threats of violence and preparations for defense have generated "a pervasive anxiety for personal and group security,"<sup>62</sup> culminating in "a constant process of mobilization of the population under the supervision of security experts, anxiety managers, and specialists in violence."<sup>63</sup>

In many communities, under perpetual apprehension of violence, power considerations, as measured by aggregate fighting potential, inevitably predominate. The overriding goal of maintaining national security in the sense of freedom from external coercion and dictation necessitates the continuing appraisal and reappraisal of all social values and institutional practices with state-power considerations in view. Wealth values and institutions are drawn into the task of national defense and mobilization and are hence subordinated to power. Scientific skill and education are requisitioned for research and development. Public enlightenment is curtailed or distorted in the name of national security and defense secrecy. Public health programs are regimented in such a way as to conserve the human resources that figure in military potential. Affection and ecclesiastical institutions and practices are condoned only insofar as they interpose no ideological or behavioral obstacles to national security. Institutions and practices of social class and caste are modified and restructured to the extent that national vulnerability is believed to be at stake.

Because of obsession with the real or imagined needs of national security, resources are diverted to large-scale arms and other defense programs. Consequently, the scope of government in politics, in industry and business, in science and education, in public

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60. See generally R. BARNET, *THE ROOTS OF WAR* (1972); B. COCHRAN, *THE WAR SYSTEM* (1965); R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* (1968); R. FALK, *THIS ENDANGERED PLANET* (1971); H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1965 ed.); *LAW AND CIVIL WAR IN THE MODERN WORLD* (J. Moore ed. 1974); R. NISBET, *TWILIGHT OF AUTHORITY* 146-93 (1975); 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (C. Black & R. Falk eds. 1971); Lasswell, *The Garrison State Hypothesis Today*, in *CHANGING PATTERNS OF MILITARY POLITICS* 51 (S. Huntington ed. 1962); Lasswell, *The Garrison State and Specialists on Violence*, in H. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR* 146 (1948).

61. Reisman, *Private Armies in a Global War System: Prologue to Decision*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 252 (J. Moore ed. 1974) [hereinafter cited as Reisman]; Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973).

62. Reisman, *supra* note 61, at 263.

63. *Id.* at 264.

health, and in every other sector of life has immensely expanded. Many functions and activities, traditionally civic in nature, are either taken over or regimented by government, with its ever-burgeoning bureaucratic machinery. Expanded government leads to more centralized government, with greater concentration of power and resources in the central (federal) government, especially in a few hands in the executive branch.<sup>64</sup>

The degree of regimentation, governmentalization, centralization and concentration differs of course from community to community. In a totalitarian polity committed to a totalitarian ideology, society is practically subordinated to government and swallowed up by government.<sup>65</sup> Power, which is regarded as all pervasive and omni-competent, tolerates little challenge. Politicization of civic activities is the catchword. "Big Brother," not the acting individual person, decides and directs. The traditional realms of private choice are extravagantly encroached upon by government. For countries preoccupied with the critical task of nation-building and modernization, in a world of contending ideologies, dynamic change and insecurity, government is generally the most important, indeed the only, sector capable of undertaking this task.<sup>66</sup> Hence, the syndromes of governmentalization, regimentation, centralization and concentration have vigorously manifested themselves. Today, even the older liberal democratic polities are not immune from these syndromes, as they are plagued, only in lesser degree, by the chronic expectations of violence and by the complex problems of "the welfare state" and of "interdependence amid scarcity."<sup>67</sup>

Encroachments upon a properly functioning civic order come, increasingly, also from nongovernmental sources. Private parties may coerce through naked power and with regard to all values.

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64. See M. CROZIER, S. HUNTINGTON, & J. WATANUKI, *THE CRISIS OF DEMOCRACY* (1975); Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 J. PUB. L. 3 (1973).

65. "The very essence of a totalitarian society," in the words of a recent Canadian governmental report on privacy, "is that it penetrates and intrudes into these realms [of civic order]—with nearly perfect totality in Orwell's 1984." *PRIVACY AND COMPUTERS*, *supra* note 56, at 12.

66. See L. CHEN & H. LASSWELL, *FORMOSA, CHINA, AND THE UNITED NATIONS* 322-32 (1967); M. JANOWITZ, *THE MILITARY IN THE POLITICAL DEVELOPMENT OF NEW NATIONS* (1964); *THE ROLE OF THE MILITARY IN UNDERDEVELOPED COUNTRIES* (J. Johnson ed. 1962).

67. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969, 998 (1975).



The dramatic potentialities in private coercion are well-illustrated in the contemporary practices of terrorism.<sup>68</sup> As the world community becomes a global village equipped with instantaneous communication, it is possible to focus world-wide attention simultaneously on a single spectacular event. In consequence, the terror practiced by individuals and small groups generates impact far beyond the locality in which a particular incident occurs.<sup>69</sup>

Increasing threats to civic order are today most dramatically manifested in regard to privacy. This is a consequence both of the spectacular developments of modern science and technology that are capable of penetrating the traditional zones of privacy and of the intensity with which certain demands to invade privacy are propagated by governmental and private sectors alike.<sup>70</sup> The modalities of encroachment, as Alan Westin conveniently summarizes in his outstanding study, are threefold: (1) "physical surveillance,"<sup>71</sup> (2) "psychological surveillance,"<sup>72</sup> and (3) "data surveillance."<sup>73</sup>

Physical surveillance involves "the observation through optical or acoustical devices of a person's location, acts, speech, or private writing without his knowledge or against his will."<sup>74</sup> Such surveillance, clandestine in nature, may be carried out by a host of devices, including telephone tapping, concealed microphones of various kinds (magnetic, contact, laser, miniature, and so on, and

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68. See generally INTERNATIONAL TERRORISM AND WORLD SECURITY (D. Carlton & C. Schaerf eds. 1975); Franck & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974); Measures to Prevent International Terrorism, Study by the Secretariat, U.N. Doc. A/C.6/418 (1972); Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy*, 40 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 47 (1970); Rovine, *The Contemporary International Legal Attack on Terrorism*, 3 ISRAEL Y.B. HUMAN RIGHTS 9 (1973). See also Abu-Lughod, *Unconventional Violence and International Politics*, 67 AM. J. INT'L L. 100-04 (1973); Dugard, *Towards the Definition of International Terrorism*, *id.* at 94-100; Moore, *Toward Legal Restraints on International Terrorism*, *id.* at 88-94.

69. Witness, for example, the Black September at the 1972 Olympic games in Munich. The details are discussed in C. DOBSON, *BLACK SEPTEMBER* (1974). See also *The Economist*, Sept. 9, 1972, at 31-34; *Newsweek*, Sept. 18, 1972, at 24-35; *Time*, Sept. 18, 1972, at 22-33; *N.Y. Times*, Sept. 6, 1972, at 1, col. 8; *Washington Post*, Sept. 6, 1972, at 1, col. 7.

70. For an early detection of this trend long before the contemporary burgeoning of books and articles, see Lasswell, *The Threat to Privacy*, in *CONFLICT OF LOYALTIES* 121 (R. MacIver ed. 1952).

71. A. WESTIN, *supra* note 58, at 68-69, 90.

72. *Id.* at 68, 133.

73. *Id.* at 68, 158.

74. *Id.* at 68.

microphone bullets), miniature transmitters, miniaturized and transistorized tape recorders, ultrared photography, hidden cameras, closed-circuit television, one-way glass, long-distance lenses and informer infiltration.<sup>75</sup>

Psychological surveillance includes the use of drugs or hypnosis, singly or in combination, to induce revelation of a person's entire life history including intimate details, as well as the use of the polygraph (lie detection), personality testing (oral or written) and various other methods of enforced disclosure which extract information without knowledge or genuine informed consent of the individual concerned.<sup>76</sup>

Data surveillance, as a result of the advent of electronic data-processing (primarily through the computer) and the rapid and wide application of this new technology by both governmental and non-governmental sectors, has moved from the manual to the electronic age, from decentralization and fragmentation to centralization and concentration.<sup>77</sup> In a data-rich civilization, as symbolized

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75. For more details, see M. BRENTON, *THE PRIVACY INVADERS* (1964); R. BROWN, *THE ELECTRONIC INVASION* (1967); S. DASH, *THE EAVESDROPPERS* (1959); M. MAYER, *RIGHTS OF PRIVACY* (1972); V. PACKARD, *THE NAKED SOCIETY* (1964); UNCLE SAM IS WATCHING YOU (H. Barth ed. 1971); A. WESTIN, *supra* note 58, at 69-132; Donner, *Political Intelligence: Cameras, Informers and Files*, in *PRIVACY IN A FREE SOCIETY* 56 (Final Report-Annual Chief Justice Earl Warren Conference on Advocacy in the United States, 1974); Jones, *Some Threats of Technology to Privacy*, in *PRIVACY AND HUMAN RIGHTS* 139-56 (A. Robertson ed. 1973); Juvigny, *Modern Scientific and Technical Developments and Their Consequences on the Protection of the Right to Respect for a Person's Private and Family Life, His Home and Communications*, in *id.* at 132-35; Lasswell, *supra* note 70; Pyle, *Spies Without Masters: The Army Still Watches Civilian Politics*, 1 *CIV. LIB. REV.* 38 (Summer 1974); Schwartz, *Six Years of Tapping and Bugging*, *id.* at 26; Shattuck, *Tilting at the Surveillance Apparatus*, *id.* at 59.

76. See M. BRENTON, *supra* note 75, at 91-116; L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* (2d ed. 1961); F. INBAU & J. REID, *LIE DETECTION AND CRIMINAL INTERROGATION* (3d ed. 1953); A. WESTIN, *supra* note 58, at 133-57; Des-  
sion, et al., *Drug-Induced Revelation and Criminal Investigation*, 62 *YALE L.J.* 315 (1953); Jones, *supra* note 75, at 156-60; Juvigny, *supra* note 75, at 137-38; Lasswell, *supra* note 70, at 125-26.

77. As Miller points out:

Until recently, informational privacy has been relatively easy to protect: (1) large quantities of information about individuals traditionally have not been collected and therefore have not been available to others; (2) the available information generally has been maintained on a decentralized basis and typically has been widely scattered; (3) the available information has been relatively superficial in character and often has been allowed to atrophy to the point of uselessness; (4) access to the available information has not been easy to secure; (5) people in a highly mobile society have been difficult to keep track of; and (6) most people have been unable to interpret and infer

by the mushrooming data banks, the enormous capacities (in speed, volume, and efficiency) of modern technology to gather, store, retrieve, process, and disseminate information have led to the information explosion, pregnant with menacing threats to informational privacy of individuals and groups. Under the onslaught of the escalating spiral of data-gathering, dossier-building and record-keeping, the individual finds himself steadily losing control over personal information.<sup>78</sup>

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revealing information from the available data.

A. MILLER, *supra* note 56, at 26. As a consequence of the "combination of greater social planning and computer capacity," "many governmental agencies are beginning to ask increasingly complex, probing, and sensitive questions." *Id.* at 21.

Characterizing the developing computer technology in terms of "digital representation," "mass storage devices," and "on-line, multi-access systems," Niblett stresses:

These modern systems constitute a vast communication network for digital information in which the central storage devices can be interrogated and the data processed with imperceptible delays from many remote stations. By 'on-line' is meant that communication is direct from the central processor to peripheral equipment such as teletype consoles and visual display screens. The systems operate in 'real time'—that is to say, the result of a processing operation is available instantly or on a time scale short by comparison with the process it is controlling or monitoring. The term "multi-access" indicates that the computer is available simultaneously to many users, who may be at terminals remote from the computer itself.

Niblett, *Computers and Privacy*, in *PRIVACY AND HUMAN RIGHTS* 167, 169-70 (A. Robertson ed. 1973). Today, computers are employed to store not only "scientific or numerical information, or information already in the public domain," but, increasingly, sensitive information about one's personal life. *Id.* at 170-71. Such information, Niblett adds, "is increasingly being fed into the memories of computers and much of it can now be recorded and updated as it is created; we are approaching the on-line society in which our records are generated and maintained 'on line.'"

78. See *Computer Privacy, Hearings Before the Subcomm. on Ad. Prac. and Proc. of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (Mar. 14-15, 1967); *The Computer and Invasion of Privacy: Hearings Before the Special Subcomm. on Invasion of Privacy, of the House Comm. on Gov't Operations*, 89th Cong., 2d Sess. (July 26-28, 1966); *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS* (1973) (Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Department of Health, Education & Welfare); E. ENGBERG, *THE SPY IN THE CORPORATE STRUCTURE AND THE RIGHT TO PRIVACY* (1967); P. HAMILTON, *ESPIONAGE AND SUBVERSION IN AN INDUSTRIAL SOCIETY* (1967); A. HARRISON, *THE PROBLEM OF PRIVACY IN THE COMPUTER AGE: AN ANNOTATED BIBLIOGRAPHY* (1970); E. LONG, *THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY* (1966); A. MILLER, *supra* note 56; *ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE* (S. Wheeler ed. 1970); *PRIVACY, COMPUTERS, AND YOU* (B. Rowe ed. 1972); J. ROSENBERG, *THE DEATH OF PRIVACY* (1969); J. RULE, *PRIVATE LIVES AND PUBLIC SURVEILLANCE* (1974); *SECURITY AND PRIVACY IN COMPUTER SYSTEMS* (L. Hoffman ed. 1973); A. WESTIN, *supra* note 58, at 158-68; A. WESTIN & M. BAKER, *DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY* (1972); *Computers, Data Banks, and Individual Privacy*, 53 MINN. L. REV. 211 (1963); *INFORMATION TECHNOLOGY IN A DEMOCRACY* (A. Westin ed. 1971); Lass-

As knowledge and technique for invading privacy increase, so also do demands for encroaching upon the privacy of individuals and groups, whether for legitimate reasons or otherwise. The threats and assaults come from the private sector as well as the public. They come from actors with and without malice. "Data-mania" takes on a life of its own and keeps growing.<sup>79</sup> The damage that the clandestine surveillances can do is manifold and far-reaching. Thus, a report by the Secretary-General of the United Nations summarizes:

Wholesale invasions of privacy inhibit liberty, often purposely. This is particularly true of surreptitious invasions, like electronic eavesdropping, spies, informers, entrap-pers, and psychological testing, the existence of which the subject is often unaware until too late. The community becomes fear-ridden, and no one can be trusted, whether he be family, friend or associate; indeed, a person may be led to continual distrust of himself, as his efforts at individual self-fulfilment conflict with the norms of authority. This destruction of trust is one of the major dangers to a free society. A pervasive mistrust of others impairs freedom of assembly, for men fearful of spies and

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well, *Policy Problems of a Data-Rich Civilization*, in *INFORMATION TECHNOLOGY IN A DEMOCRACY*, *supra*, at 187-97; Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089 (1969); Miller, *The Right to Privacy: Data Banks and Dossiers*, in *PRIVACY IN A FREE SOCIETY*, *supra* note 75, at 72-85; Weisner, *The Information Revolution—and the Bill of Rights*, 5 LAW AND COMPUTER TECH. 40 (No. 2 March-April 1972).

Thus, as Peter Drucker reminds us, "There is a great deal more to information and data processing than the computer; the computer is to the information industry roughly what the central power station is to the electrical industry." P. DRUCKER, *THE AGE OF DISCONTINUITY* 24 (1968).

In underscoring the threats posed by contemporary technological developments, we do not seek to minimize the constructive contribution of science-based technology to social process. The more positive contribution is described by Juvigny:

It is easy to understand the fascination which the possible use of computers in government departments exercises on organisation and methods chiefs. In the collecting and interpreting of information, in programming, in decision-making, in improving the registration of births, marriages and deaths, in conscription, in police records, in the administration of revenue departments, staff, equipment stocks and the like, or in general or sector planning, the use of computers appears to make it possible both to run public services economically and to increase their means of action and the effectiveness of their programmes.

Juvigny, *supra* note 75, at 135.

79. As Arthur Miller has stated: "The new information technologies seem to have given birth to a new social virus—'data-mania.'" A. MILLER, *supra* note 56, at 22.

informers, human or mechanical, are loath to join together meaningfully. And a man's awareness that others lack faith in him seriously weakens his chance for self-fulfilment, for few men can develop adequately without the confidence of others. Thus, the detailed questionnaire for employment, housing, insurance and other matters, the hidden but suspected cameras in the washroom, the psychological tests, the lie detector and truth serum—all of these devices for ferreting out intimate and often unconscious details of our lives, produce a pervasive insecurity which suppresses individuality, discourages responsibility and encourages frightened conformity . . . .<sup>80</sup>

## II. *Basic Community Policies*

Our postulated goal of human dignity favors the widest possible freedom of choice and, hence, the fewest possible coerced choices for the individual, whether acting singly or through groups. The projected ideal is toward a social context in which "choices" rather than "decisions" are cultivated on the largest possible scale, thereby reducing occasions for coercion to an inescapable minimum.<sup>81</sup> This is in keeping with the liberal tradition that seeks to minimize the politicization or governmentalization of social interactions and to maintain institutional processes compatible with human dignity values. In the words of Westin:

Liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation—time devoted to sports, arts, literature, and similar non-political pursuits. These areas of individual pursuit prevent the total politicizing of life and permit other models of success and happiness to serve as alternatives to the political career and the citizenship role.<sup>82</sup>

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80. Respect for the Privacy of Individuals, Report of the Secretary-General, U.N. Doc. E/CN.4/1116 (1973) [hereinafter cited as U.N. Report on Privacy].

The constellation of practices that have become known as "Watergate" of course represent the epitome of combined governmental and private invasions of civic order. For the various techniques in political surveillance and the problems they raise, see 1 N. DORSEN, P. BENDER, & B. NEUBORNE, EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 183-201 (4th Law School ed. 1976).

81. See note 3 *supra*.

82. A. WESTIN, *supra* note 58, at 24.

In more fundamental conception, he elaborates further:

In democratic societies there is a fundamental belief in the uniqueness of the individual, in his basic dignity and worth as a creature of God and a human being, and in the need to maintain social processes that safeguard his sacred individuality. Psychologists and sociologists have linked the development and maintenance of this sense of individuality to the human need for autonomy—the desire to avoid being manipulated or dominated wholly by others.<sup>83</sup>

A properly functioning civic order which affords adequate protection of a large zone of personal autonomy is thus crucial for ample fulfillment of the individual and for innovation and rich diversity in community life. Personal autonomy thrives when privacy is respected. Creativity flourishes in a social environment in which voluntary participation in the life of society is affirmed and individuals are left free either to induce one another to engage in the production and accumulation of one value rather than another or to enjoy a particular value rather than to accumulate it further.

The right to privacy, in the restricted sense in which we have defined it,<sup>84</sup> is demonstrably indispensable to a meaningful civic order. Without substantial control over the flow of information about the private self, autonomy in an individual's personal life and private choices is unattainable. The ideal of civic order requires the least possible interference, by officials and nonofficials alike, with individual choice.<sup>85</sup> Such a civic order is unthinkable if the individual is under constant surveillance and indiscriminately laid bare in all matters. In summation of these interrelations, one of the authors some years ago wrote: "Respect is the deference that we give and deserve in our capacity as human beings, and on the basis of our individual merit. The presumption in favor of privacy follows from our respect for freedom of choice, for autonomy, for self-direction on the part of everyone."<sup>86</sup> Similarly, Clinton Rossiter has written:

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83. *Id.* at 33.

84. See note 58 *supra* and accompanying text.

85. See notes 53-58 *supra* and accompanying text.

86. Lasswell, *supra* note 70, at 134. For a derivational relation between privacy and affection, and philosophical grounds for the protection of privacy, see Fried, note 58 *supra*. Fried emphasizes that privacy is not "just a defensive right;" it "forms the necessary context for the intimate relations of love and friendship." *Id.* at 490. He adds:

*Privacy* is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society. It is an attempt, that is to say, to do more than maintain a posture of self-respecting independence toward other men; it seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no overriding compulsion to share everything of value with others, not even with those he loves and trusts.<sup>87</sup>

A critical function of the civic order is to foster an environment in which people can indulge in a wide range of spontaneous cultural expressions, experimentations and innovations in ways compatible with the aggregate common interest. A rich culture and civic order intimately interact and reinforce each other. Culture flourishes when the civic order is vigorous and individuals and groups enjoy a high degree of autonomy and fulfillment in the shaping and sharing of all values. An enriched culture provides the matrix in which spontaneity, creativity, and diversity can thrive. Cultural creativity, in a wide-ranging sense, depends upon a strategic combination of innovation and the capacity to anticipate and recognize the potential significance of an innovation. In the light of historical climaxes of creativity-explosion in many groups and civilizations, it is preferable, in a search for a world community of human dignity, to rely upon the initiatives of humanity as a whole rather than upon those of a supercaste with power permanently to domineer over their fellow beings.

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[P]rivacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.

*Id.* at 477. See also C. FRIED, *AN ANATOMY OF VALUES* 137-52 (1970).

87. Rossiter, *The Pattern of Liberty*, in *ASPECTS OF LIBERTY* 15, 17 (M. Konvitz & C. Rossiter eds. 1958). See also H. ARENDT, *THE HUMAN CONDITION* 22-78 (1958); C. CLARKE, *PRIVATE RIGHTS AND FREEDOM OF THE INDIVIDUAL* (1972) (Ditchley paper No. 41); D. MADGWICK, *PRIVACY UNDER ATTACK* (1968); H. ROELOFS, *THE TENSION OF CITIZENSHIP: PRIVATE MAN AND PUBLIC DUTY* (1957); E. SHILS, *THE TORMENT OF SECRECY* 21-27, 201-07 (1956); Shils, *Social Inquiry and the Autonomy of the Individual*, in *THE HUMAN MEANING OF THE SOCIAL SCIENCES* 114 (D. Lerner ed. 1959).

To cultivate the high creativity of humanity as a whole, it is important that the range of individual choice be made as wide as possible and that effective conditions be created and sustained to stimulate awareness of the full range of personal potential. This requires that protection be extended not only to the isolated action of the individual, but also to the collective action of individuals acting in and through groups. An individual, acting qua individual, of course finds self-fulfillment and makes a contribution to the common interest in varying degrees and various ways, differing from community to community. Yet, in today's world of complex interdependences and pluralism where an individual is often overwhelmed by a deep sense of powerlessness, individuals can ultimately find greatest self-fulfillment, and make their richest contribution to common interest, only when they are also free to form groups of various types, identify with many different groups, and participate in group activities in the shaping and sharing of values.<sup>88</sup> If the aggregate freedom of choice is to be secured in a world of rich creativity and diversity, the protection of civic order must, therefore, be extended to groups as well as individuals. In the contemporary world, many people still achieve a sense of respect—self-esteem and esteem by others—only through intense group identifications. As Isaacs has said: "Some individuals derive sufficient self-esteem out of the stuff of their individual personalities alone. Others have to depend on their group associations

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88. See generally B. DE JOUVENEL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 56-70 (J. Huntington trans. 1963); A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J. Mayer ed. 1969); H. EHRLMANN, *INTEREST GROUPS ON FOUR CONTINENTS* (1958); *ETHNICITY: THEORY AND EXPERIENCE* (N. Glazer & D. Moynihan eds. 1975) [hereinafter cited as *ETHNICITY*]; *THE GOVERNMENT OF ASSOCIATIONS: SELECTIONS FROM THE BEHAVIORAL SCIENCES* (W. Glaser & D. Sills eds. 1966); *GROUP RELATIONS AND GROUP ANTAGONISMS* (R. MacIver ed. 1944); H. GUETZKOW, *MULTIPLE LOYALTIES* (1955); J. KLEIN, *THE STUDY OF GROUPS* (1956); W. KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959); J. LADOR-LEDERER, *INTERNATIONAL GROUP PROTECTION* (1968); H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 25-51 (1950); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); M. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 123-73 (1968); R. NISBET, *THE QUEST FOR COMMUNITY* (1953); *PRIVATE GOVERNMENT* (S. Lakoff ed. 1973); S. SCHACHTER, *THE PSYCHOLOGY OF AFFILIATION* (1959); P. SECORD & C. BACKMAN, *SOCIAL PSYCHOLOGY* (2d ed. 1974); W. SPROTT, *HUMAN GROUPS* (1958); S. STOLJAR, *GROUPS AND ENTITIES: AN INQUIRY INTO CORPORATE THEORY* (1973); *VOLUNTARY ASSOCIATIONS (NOMOS XI)*, J. Pennock & J. Chapman eds. 1969; Affeldt & Seney, *Group Sanctions and Personal Rights—Professions, Occupations and Labor Law*, 11 ST. LOUIS L.J. 382 (1967) and 12 ST. LOUIS L.J. 179 (1968); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); *Interest Groups in International Perspective*, 413 THE ANNALS (1974).



to supply what their own individualities may often deny them."<sup>89</sup> It is "this need for self-esteem, the need to acquire it, feel it, assert it,"<sup>90</sup> that has generated the respect revolution of our time and has pointed to the critical need for affording the utmost autonomy to groups as well as individuals in ways compatible with the common interest. It may be recalled that freedom of choice can be manifested in many different ways in different cultures, allowing a diversity in expression and priorities through time.

The better securing of the basic policies of civic order requires the systematic and deliberate management of effective power and authoritative decision at all community levels—global, regional, and national.<sup>91</sup> It is the whole matrix of decision, constitutive and public order, taken in the aggregate, that protects and maintains the civic order. It may seem somewhat visionary to suggest that a power elite be animated by the goal of aggregate freedom of choice of individuals and that power be made consciously to discipline itself.<sup>92</sup> Yet, a realistic aspiration for improved civic order must seek, not the unattainable goal of altogether eliminating power in

89. Isaacs, *Basic Group Identity: The Idols of the Tribe*, in *ETHNICITY*, *supra* note 88, at 29, 35.

90. *Id.* at 36.

91. See note 97 *infra* and accompanying text.

92. The development of the common law and of constitutionalism more generally suggests that it is not entirely utopian to seek the self-limitation of effective power. How the predispositions of effective elites may be managed to secure the establishment of appropriate constitutive process is an inquiry to which we give attention elsewhere. Some indication of the conditions that affect decision and of relevant strategies for change is made in the conclusion to this article.

The general problem of securing civic order would not appear essentially different from that involved in creating the predispositions (and institutions) necessary to the maintenance of minimum order. A comprehensive statement of the more important conditions is offered in Lasswell, *The Social and Political Framework of War and Peace*, in *AGGRESSION AND DEFENSE: NEURAL MECHANISMS AND SOCIAL PATTERNS* 317 (C. Clemente & D. Lindsley eds. 1967). For an outline of recommended strategies, see M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 375-83 (1961).

In the latter reference the general problem is defined as follows:

The task of highest priority . . . for every one genuinely committed to the goal values of a world public order of human dignity would, accordingly, appear to be that of creating in all peoples of the world the perspectives necessary both to their realistic understanding of this common interest and to their acceptance and initiation of the detailed measures in sanctioning process appropriately designed to secure such interest. It is, as we have seen, the conflicting, confused, and disoriented perspectives of peoples—such as the syndromes in expectations of violence, patterns of parochial identification, and demands for domination—and not the inexorable requirements of environmental factors, which keep alive the contention of

the social process, but rather the conscientious employment of power to maximize the aggregate freedom of choice in the shaping and sharing of values.<sup>93</sup>

The essential requirement is that civic order interests be put under public order guarantee.<sup>94</sup> A dynamic society is always cre-

world orders, with such appalling threat for all mankind. The maximization postulate—that men act within their capabilities to maximize their values—suggests that by appropriate modifications in perspectives the peoples of the world can be encouraged to move toward both the establishment of a more effective constitutive process and the making of more rational specific sanctioning decisions. It is common ground of both historical knowledge and contemporary science that the factors—culture, class, interest, personality, and crisis—which most directly condition peoples' perspectives can be changed and managed to promote constructive rather than destructive perspectives. Promising alternatives in communication and collaboration designed to promote the perspectives appropriate to the maintenance of minimum order and, with minimum order, opportunity for peaceful progress toward a more comprehensive public order of human dignity, have long been recommended by competent specialists upon different instruments of policy and different value processes, and await employment in sufficiently comprehensive, integrated, and disciplined programs.

*Id.* at 376.

93. Our position is thus in clear distinction to various versions of anarchism that project total abolition of power in social process. The revival of interest in anarchism is shown by the recent proliferation of literature and reproduction of classic works. See ANARCHISM (R. Hoffman ed. 1970); ANARCHISM TODAY (D. Apter & J. Joll eds. 1971); M. BAKUNIN, GOD AND THE STATE (Dover ed. 1970); BAKUNIN ON ANARCHY (S. Dolgoff ed. 1972); G. BALDELLI, SOCIAL ANARCHISM (1971); A. CARTER, THE POLITICAL THEORY OF ANARCHISM (1971); THE ESSENTIAL KROPOTKIN (E. Capouya & K. Tompkins eds. 1975); THE ESSENTIAL WORKS OF ANARCHISM (M. Schatz ed. 1972); W. GODWIN, AN ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS (R. Preston ed. 1926); E. GOLDMAN, ANARCHISM, AND OTHER ESSAYS (1969); D. GUERIN, ANARCHISM: FROM THEORY TO PRACTICE (1970); J. JOLL, THE ANARCHISTS (1964); A. MASTERS, BAKUNIN, THE FATHER OF ANARCHISM (1974); PATTERNS OF ANARCHY (L. Krimerman & L. Perry eds. 1966); H. READ, ANARCHY AND ORDER: ESSAYS IN POLITICS (1971); J. REIMAN, IN DEFENSE OF POLITICAL PHILOSOPHY: A REPLY TO ROBERT PAUL WOLFF'S IN DEFENSE OF ANARCHISM (1972); G. RUNKLE, ANARCHISM: OLD AND NEW (1972); B. RUSSELL, PROPOSED ROADS TO FREEDOM: SOCIALISM, ANARCHISM AND SYNDICALISM (1931); R. SCALAPINO & G. YU, THE CHINESE ANARCHIST MOVEMENT (1961); C. WARD, ANARCHY IN ACTION (1973); R. WOLFF, IN DEFENSE OF ANARCHISM (1970); G. WOODCOCK, ANARCHISM: A HISTORY OF LIBERTARIAN IDEAS AND MOVEMENTS (1962).

For a contemporary philosophical exposition expousing "the minimal state," see R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Nozick, like Rawls (J. RAWLS, A THEORY OF JUSTICE (1971)), is largely concerned with establishing restraints upon the exercise of power by derivational logic. There are of course limits to the enlightenment that can be achieved by this technique.

94. The importance of public order in protecting private choice is affirmed from many philosophical perspectives. See Frankel, *supra* note 8; Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955).

One alternative Frankel does not adequately consider is the postulation of a comprehensive set of goal values without suggestion that these values have a base in any

ating novel arrangements in the shaping and sharing of values and generating a continuum of expectations about the severity and mildness of possible sanctions. With a wide range of expectations in constant flux, some events become incorporated through decision in the body of public order, some remain within the sphere of civic order. The boundary separating the civic order from the public order is inherently fluid and changing in an ever-changing world. Expectations of severe sanctions attending a particular institutional practice may become weakened or disappear through time, thereby transforming a matter of public order concern to that of civic order. Conversely, when expectations of sanctions become severe within a particular conventional civic context, civic order ceases to be so in that particular context; a functional change is taking place, and the organized community steps directly into the picture. The tension generated by the fluidity of the ever-changing boundary between civic and public order is especially pronounced in the contemporary epoch of accelerating change, as characterized by fantastic gropings and innovativeness in lifestyle, technology and community practice.<sup>95</sup>

In the light of the dynamic relationship between civic order and public order in this interdependent world of accelerating changes, it is immensely important that the whole flow of comprehensive public order decisions, including constitutive decisions, be positively managed in a way as to promote the largest domain of civic order. This positive management must require, as has been discussed, the appropriate accommodation of different individual and community interests when they become incompatible with each other.<sup>96</sup> The aggregate freedom of choice of individuals and groups can only be augmented when a vigorous public order exhibits effective constitutive processes of authoritative decision and a flow of particular decisions about the shaping and sharing of values which incorporate and manifest the values of human dignity.

### III. *Trends in Decision*

Since civic order entails the totality of freedom of choice of all individuals in regard to all values other than power, it is main-

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kind of natural law philosophy. Such a postulation would remove many of the difficulties Frankel finds in John Stuart Mill and others. See generally *The Protection of Respect*, *supra* note 1, at 927-37.

95. See A. TOFFLER, *FUTURE SHOCK* (1971) for development of the theme of accelerating change and its profoundly unsettling implications for the shaping and sharing of values.

96. See notes 7-52 *supra* and accompanying text.

tained and affected by the whole global constitutive process of authoritative decision and the entire flow of public order decisions which emanate from that process. The quality of civic order and the expansion or contraction of the domain of civic order in the larger community can, therefore, be realistically and fully illuminated only by reference to the functioning of the various constitutive processes of authoritative decision—global, regional and national—and to the flow of public order decisions that emerge from such processes for the regulation of each of the different value processes.

The full impact of all these constitutive processes, including both transnational and national, upon the achievement and maintenance of an appropriate civic order depends of course upon the degree to which the important features of such processes both reflect and secure the common interest in human dignity values. The relevant decisions in any constitutive process are those which shape its more important features, such as:

- the degree to which parties who are affected by decision are both represented in the making of such decision and held accountable to basic community policies;

- the comprehensiveness and clarity with which the more fundamental policies, for which the process is maintained, articulate a common interest in human dignity values;

- the adequacy of structures of authority and their openness in access and capabilities for insuring compulsory attendance;

- the extent to which prescriptions from all communities are established and maintained for the protection of freedom of choice, with bases in effective power marshalled in support of authority;

- the availability of prompt and dependable procedures in decision process, which both reflect due process and involve no unnecessary coercion or other invasion of individual rights;

- and, finally, the various different outcomes in decision necessary, comprehensively and economically, to secure the common interests of all individuals and groups in the goal values of human dignity.

The different types of decision outcomes required for the better protection of civic order may be specified as including: an intelligence function, which is dependable and creative, but involving no unnecessary invasions of civic order; a promotion function, which is effective and integrative, but open and nonoppressive; a prescribing function, which establishes appropriate stability in expectations about authority and control, while giving all opportunity to every individual to participate by word and deed in the clarification of common interest; an invocation function, which is responsive, timely and nonprovocative, affording full opportunity for challenge of the lawfulness of all acts, public or private; an application function, which is uniform, effective and constructive, while conducted with appropriate notice, hearing, fairness and dispatch; a termination function, which is balanced in relation to conservation and change and appropriate amelioration of the destructive impact of change; and an appraisal function, which is independent and continuous, facilitating inquiry about the adequacy of past decision process to serve postulated goals. It scarcely needs observation that the studies necessary to evaluate the impact upon civic order of contemporary constitutive processes of authoritative decision are yet to be made.<sup>97</sup>

The constitutive process of authoritative decision in any community typically establishes and maintains a complex network of prescriptive codes, notably supervisory, regulatory, enterprising and corrective. The supervisory code relates to the private activities concerning which the community decision-maker operates much in the role of umpire at the initiative of the parties. The different supervisory codes, such as those embodied in the law of agreement and the law of deprivations, establish a framework of expectations which enable members of the community to take the initiative to shape and share values by agreement (persuasion) in confidence that expectations created in their interactions will be honored and that unauthorized deprivations will be redressed. The

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97. For some preliminary indications of the present state of the global constitutive process of authoritative decision, see McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (R. Falk & C. Black eds. 1969). For a brief indication of some recommended policies relating to the world constitutive process of authoritative decision, see McDougal, *supra* note 11, at 415-19. For more detailed development with regard to one decision function, see McDougal, Lasswell, & Reisman, *The Intelligence Function and World Public Order*, 46 *TEMP. L.Q.* (1973).

regulatory codes of a free society are designed to defend or foster the attainment of substantive criteria and institutional routines that facilitate freedom of choice in shaping and sharing values.

The enterprisory code relates to the activities performed directly by the community acting through official, territorially inclusive institutions; it authorizes direct governmental activities and lays down the basic guides for administration. With the general growth of socializing tendencies, the scope of government management has vastly increased, going far beyond such traditional functions as national defence and the maintenance of internal order through organized military and police force. Many enterprisory activities significantly contribute to the achievement of effective and meaningful participation by all members of the community in the shaping and sharing of all values.

The distinctive task of the corrective code is to specify the criteria and measures appropriate for the maintenance of responsible, nondestructive participation in the system of public order; it is indispensable to protection of the genuine freedom of choice of individuals. In short, these different and complex codes invoke differing degrees of community interference with the individual's freedom of choice, thereby affecting the civic order in various ways and in varying degrees.<sup>98</sup>

The public order decisions, emanating from the constitutive processes of authoritative decision, also importantly determine the quality of civic order achievable in global social process. These decisions include the totality of human rights decisions, both in prescription and application, both transnational and national, that permeate all value processes. It may thus be observed that the whole contemporary human rights program is designed towards ultimate attainment of a civic order in which the aggregate freedom of choice of individuals and groups is made secure, effective and meaningful, and is sustained by the whole matrix of decision, constitutive and public order. Most of the human rights prescriptions, as embodied in the United Nations Charter, the International Bill of Rights (*i.e.*, the Universal Declaration and the two Covenants) and their ancillary expressions, general and particular, are relevant in varying degrees to the attainment and maintenance of a global civic order.<sup>99</sup> Civic order is, in the sense we specify, the summa-

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98. See *The Public Interest*, *supra* note 12, at 73-76.

99. A collection of the more important global human rights prescriptions is offered in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL

tion of all protection of interests in freedom of choice. This summation is a function of the kind of accommodation that is achieved in a comprehensive public order, as outlined in the preceding section.<sup>100</sup> Inclusive accommodation comprises an entire tapestry of particular accommodations in ever-changing contexts.

Though the human rights prescriptions make no literal reference to "civic order" as such, they do contain distinctive components which, taken in the aggregate and considered in the light of their potential development, afford promise of a closer approximation to our recommended civic order. Of foremost importance is Article 28 of the Universal Declaration of Human Rights,<sup>101</sup> which projects a comprehensive "social and international order" that would embrace both a comprehensive public order and civic order as we have defined them. This Article, it may be recalled, reads:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.<sup>102</sup>

The "full" realization of the human rights and freedoms which are set forth in the Universal Declaration and which range through many value categories, would be possible only if people were to enjoy the protection of a comprehensive framework of public order, protecting their interests not only in all hitherto recognized rights but also in emerging interests not presently specified in the human rights instruments.

Another critically relevant provision is Article 30 of the Universal Declaration, discussed in other emphasis above, which states:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.<sup>103</sup>

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INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973) [hereinafter cited as U.N. HUMAN RIGHTS INSTRUMENTS]. See also BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971); BASIC DOCUMENTS, *supra* note 20.

100. See notes 7-52 *supra* and accompanying text.

101. Universal Declaration, *supra* note 18, art. 28, U.N. Doc. A/810, at 76.

102. *Id.*

103. *Id.* art. 30, U.N. Doc. A/810, at 77.

This article, as will be developed, may eventually emerge as a close approximation to the ninth amendment of the United States Constitution, which embodies the common law presumption that choices not expressly prohibited to people are reserved as within the scope of their aggregate freedom.<sup>104</sup> Comparable provisions, as previously indicated, are contained in the two Covenants and the two regional human rights Conventions, European and American.<sup>105</sup>

The right to "participate in the cultural life of the community"<sup>106</sup> is an important manifestation and a critical component of civic order. Thus conceived, the cultural rights, as enunciated in the transnational human rights prescriptions, assume far greater significance than is generally recognized. In Article 22, which is authoritatively interpreted as employing the concept of social security, "not in the technical sense of social insurance and other social assistance,"<sup>107</sup> but more comprehensively to include "all the social and economic freedoms necessary to ensure the individual's well-being,"<sup>108</sup> the Universal Declaration of Human Rights stipulates:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>109</sup>

In amplification Article 27 provides both highly general and more specific protection:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>110</sup>

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104. See notes 161-65 *infra* and accompanying text.

105. See notes 26-30 *supra* and accompanying text.

106. Universal Declaration, *supra* note 18, art. 27, U.N. Doc. A/810, at 76.

107. N. ROBINSON, *supra* note 22, at 133.

108. *Id.*

109. Universal Declaration, *supra* note 18, art. 22, U.N. Doc. A/810, at 75.

110. *Id.* art. 27, U.N. Doc. A/810, at 76.



As befitting its title, the International Covenant on Economic, Social, and Cultural Rights<sup>111</sup> is more detailed in its formulation of cultural rights. Article 15 provides:

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.<sup>112</sup>

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111. Covenant on Economic Rights, *supra* note 24.

112. *Id.* art. 15, 21 U.N. GAOR, Supp. (No. 16) at 51.

On the regional level, the protection of cultural rights is enshrined in the American Declaration of the Rights and Duties of Man. Article 13 reads:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

BASIC DOCUMENTS, *supra* note 20, at 189-90. The American Convention on Human Rights, in Article 26, also provides:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

American Convention, *supra* note 28, art. 26, 9 INT'L LEGAL MATERIALS at 109. It is unfortunate, however, that the European Convention on Human Rights, for reasons unclear, contains no comparable prescription.

The scope and potential significance of these novel prescriptions for the protection of cultural rights were amply examined and illuminated in 1970 by a panel of experts exploring the subject of "Cultural Rights as Human Rights" under the auspices of UNESCO.<sup>113</sup> These experts generally took a very comprehensive view of both culture and cultural rights. The "Statement on Cultural Rights as Human Rights" adopted by the panel began in broad conception: "Culture is a human experience which it is difficult to define, but we recognize it as the totality of ways by which men create designs for living. It is a process of communication between men; it is the essence of being human."<sup>114</sup> Encompassing "spiritual and material values,"<sup>115</sup> culture refers, the panel asserts, to "everything which enables man to be operative and active in his world, and to use all forms of expression more and more freely to establish communication among men."<sup>116</sup>

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113. UNESCO, *Cultural Rights as Human Rights*, 3 STUDIES AND DOCUMENTS ON CULTURAL POLICIES (1970) [hereinafter cited as *Cultural Rights*].

114. *Id.* at 105.

115. *Id.*

116. *Id.* at 105-06.

The individual experts gave "culture" a variety of definitions, including: "the essence of being human," *id.* at 10; "everything that concerns intellectual, ethical, physical, even technical training," *id.* at 15; "the sum of total human activities," *id.*; "interaction," *id.* at 39; "the sum total of material and spiritual values, created by man in the process of socio-historical practice," *id.* at 43; "the result of man's creative activity in the material and spiritual sphere," *id.* at 45; and "the never-ending curiosity towards the physical, the psychological and the spiritual—the unceasing wonder and reverence towards the ultimate facts of life," *id.* at 70.

In social sciences, the classic definition of culture was that of Edward B. Tylor: "Culture . . . taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." E. TYLOR, *PRIMITIVE CULTURE* 1 (1871). This definition has been widely adopted, with appropriate modifications, by social scientists in various disciplines.

After a comprehensive survey, Alfred L. Kroeber and Clyde Kluckhohn summed up the consensus of most social scientists in these terms: "Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values . . ." Kroeber & Kluckhohn, *Culture: A Critical Review of Concepts and Definitions*, 47 *PAPERS OF THE PEABODY MUSEUM OF AMERICAN ARCHAEOLOGY AND ETHNOLOGY* 181 (1952).

Malinowski suggested an inquiry into cultures in terms of the "function" of each component of the total culture. See Malinowski, *Culture*, in 4 *ENCYS. SOC. SCI.* 621 (1931). See also R. BENEDICT, *PATTERNS OF CULTURE* (1959); B. MALINOWSKI, *A SCIENTIFIC THEORY OF CULTURE, AND OTHER ESSAYS* (1960 ed.); B. MALINOWSKI, *THE SEXUAL LIFE OF SAVAGES* (1932).

For our own definition, see H. LASSWELL & A. KAPLAN, *supra* note 88, at 47-51.

The comprehensiveness with which the experts perceived culture was carried forward in their articulation and interpretation of the scope of the relevant rights. "By the right of an individual to culture," in the words of Professor Boutros-Ghali, "it is to be understood that every man has the right of access to knowledge, to the arts and literature of all peoples, to take part in scientific advancement and to enjoy its benefits, to make his contribution towards the enrichment of cultural life."<sup>117</sup> The panel's final "State-

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In a vast literature concerning culture, other useful citations include: S. FREUD, *CHARACTER AND CULTURE* (P. Rieff ed. 1962); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930); C. GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973); E. HATCH, *THEORIES OF MAN AND CULTURE* (1973); J. HONIGMANN, *UNDERSTANDING CULTURE* (1963); A. KROEBER, *CONFIGURATIONS OF CULTURAL GROWTH* (1944); A. KROEBER, *THE NATURE OF CULTURE* (1952); *LANGUAGE IN CULTURE AND SOCIETY* (D. Hymes ed. 1964); C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (C. Jacobson & B. Schoepf trans. 1963); R. LINTON, *THE STUDY OF MAN* (1936); H. McLUHAN, *CULTURE IS OUR BUSINESS* (1970); K. MANNHEIM, *ESSAYS ON THE SOCIOLOGY OF CULTURE* (E. Mannheim & P. Kecskemeti eds. 1956); M. MEAD, *CULTURE AND COMMITMENT* (1970); M. MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1963); T. PARSONS, *THE SOCIAL SYSTEM* (1951); A. RADCLIFFE-BROWN, *A NATURAL SCIENCE OF SOCIETY* (1957); E. SAPIR, *CULTURE, LANGUAGE AND PERSONALITY* (D. Mandelbaum ed. 1958); *SCIENCE AND CULTURE* (G. Holton ed. 1965); *THE SCIENCE OF MAN IN THE WORLD CRISIS* (R. Linton ed. 1945); P. SOROKIN, *SOCIETY, CULTURE, AND PERSONALITY* (1962); A. WALLACE, *CULTURE AND PERSONALITY* (1961); L. WHITE, *THE SCIENCE OF CULTURE: A STUDY OF MAN AND CIVILIZATION* (1949); R. WILLIAMS, *CULTURE AND SOCIETY* (1958); Kluckhohn, *The Study of Culture*, in *THE POLICY SCIENCES* 86 (D. Lerner & H. Lasswell eds. 1951).

117. *Cultural Rights*, *supra* note 113, at 73.

The views expressed by other experts were no less comprehensive. Thus, Mshvenieradze understood "cultural rights" as

the rights of a human being to labour and education, to free and all-round development of his or her personality, to an active participation in creating material and spiritual values as well as using them for further progress of modern civilization. These values also include science—natural, social, medical, etc.—since it is an integral part of culture.

*Id.* at 43-44. According to Argan:

It is the right to create culture, or the right which every social group (and, in certain cases, even every individual) is acknowledged to possess, namely the right to play an active part in the community, regardless of its (or his) cultural traditions, religious beliefs, scientific and technical knowledge, moral or political opinions.

*Id.* at 89. Thapar suggested:

Cultural rights embrace the whole gamut of rights—economic, political, social. They cannot be studied in isolation. And the totality of rights becomes meaningless when the value system at the base is itself being made irrelevant. This is the core of the problem and cannot be overstressed.

*Id.* at 93. Martelanc stressed that

[t]he aim of culture should be to free man's personality, to enable him to be creative, to enable his personality to develop to its full dimensions in order

ment on Cultural Rights as Human Rights" again offered this apt summation: "The rights to culture include the possibility for each man to obtain the means of developing his personality, through his direct participation in the creation of human values, and of becoming, in this way, responsible for his situation, whether local or on a world scale."<sup>118</sup> In sum, it would appear that the increasing demands and aspirations for wider application of cultural rights, as articulated and represented by the panel experts, may ultimately contribute significantly to the formation of a global civic order.

The protection of civic order is appropriately extended to groups as well as individuals. As indicated above, group expression, no less than individual expression, is essential to individual self-fulfillment and to the optimalization of aggregate common interest.<sup>119</sup> The freedom to form voluntary groups (associations), to have access to group membership, to participate in group activities, and to maintain internal group autonomy is critical in

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that he may take an active part in everyday life; he should not just be the object of the policy of a State.

*Id.* at 82.

118. *Id.* at 107.

If we turn from individual to group perspectives, it appears that Article 27 of the International Covenant on Civil and Political Rights is relevant. This provision provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Covenant on Civil and Political Rights, *supra* note 23, art. 27, 21 U.N. GAOR, Supp. (No. 16) at 56. The Declaration of the Principles of International Cultural Cooperation, adopted by the General Conference of UNESCO in November 1966, proclaims in Article 1:

1. Each culture has a dignity and value which must be respected and preserved.

2. Every people has the right and the duty to develop its culture.

3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 103; *Cultural Rights*, *supra* note 109, at 107. This formulation is in recognition of what some experts call "the rights of cultures," as distinguished from the rights to culture.

The Director-General of UNESCO emphasized:

In the individual nation, as in the world as a whole, any living culture is entitled to be preserved so that it may realize its full human potentialities, for a culture is essentially a certain way of living as a human being and the decline of a culture, unless it is absorbed into a new culture that takes its place, entails an impoverishment of mankind as a whole.

Report of the Director-General of UNESCO, U.N. Doc. A/9227 at 11 (1973).

119. See notes 88-90 *supra* and accompanying text.

achieving an aggregate pattern of interaction in which individual autonomy is secured. The degree to which such protection is afforded serves as one barometer of the state of civic order in a given community. Such protection has traditionally been clustered about generic freedom of association, and concomitantly, freedom of assembly.<sup>120</sup>

The Universal Declaration, in Article 20, provides:

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.<sup>121</sup>

In its Article 22, with a built-in accommodation clause, the Covenant on Civil and Political Rights stipulates:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.<sup>122</sup>

Article 11 of the European Convention on Human Rights reads in part:

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120. On freedom of association, see G. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 675-96 (1970); D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* (1963); R. HORN, *GROUPS AND THE CONSTITUTION* (AMS ed. 1971); M. KONVITZ, *EXPANDING LIBERTIES* 48-85 (1967); C. RICE, *FREEDOM OF ASSOCIATION* (1962); *A Symposium on Group Interests and the Law*, 13 *RUT. L. REV.* 427 (1959); Elias, *Freedom of Assembly and Association*, 8 *J. INT'L COMM'N JURISTS* 60 (1967); Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1 (1964); Nathanson, *The Right of Association*, in *THE RIGHTS OF AMERICANS* 231 (N. Dorsen ed. 1971).

For an articulation of the intimate connection between freedom of association and the right to privacy, see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting).

121. Universal Declaration, *supra* note 18, art. 20, U.N. Doc. A/810, at 75.

122. Covenant on Civil and Political Rights, *supra* note 23, art. 22, 21 U.N. GAOR, Supp. (No. 16) at 55.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.<sup>123</sup>

Comparable prescription is also found in the American Declaration of the Rights and Duties of Man<sup>124</sup> and the American Convention on Human Rights.<sup>125</sup> Article 22 of the American Declaration states:

Every person has the right to associate with others to promote, exercise and protect his *legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature*.<sup>126</sup>

Article 16 of the American Convention provides:

1. Everyone has the right to associate freely *for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes*.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.<sup>127</sup>

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123. European Convention, *supra* note 26, art. 11(1), 213 U.N.T.S. at 232.

Paragraph 2 of this Article reads:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

*Id.*

For the application of Article 11, see F. CASTBERG, *supra* note 50, at 152-56; J. FAWCETT, *supra* note 50, at 222-24; "HUMAN RIGHTS AND THEIR LIMITATIONS," *supra* note 27, at 43-46; F. JACOBS, *supra* note 50, at 157-61.

124. American Declaration, *supra* note 20.

125. American Convention, *supra* note 28.

126. American Declaration, *supra* note 20, art. 22, BASIC DOCUMENTS, *supra* note 20, at 191 (emphasis added).

127. American Convention, *supra* note 28, art. 16, 9 INT'L LEGAL MATERIALS at 106 (emphasis added).

It will be observed that these provisions make explicit, what is implicit in the other transnational prescriptions mentioned above,<sup>128</sup> that their protection extends to a wide range of groups specialized to the shaping and sharing of different values.

It is recognized that privacy, even in its most technical aspect, is part of civic order.<sup>129</sup> In its most comprehensive sense the conception of privacy can be indefinitely expanded toward the totality of civic order. In a provision, Article 12, which is broader than the technical concept of privacy and pregnant with potentiality for further expansion, the Universal Declaration stipulates:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>130</sup>

The International Covenant on Civil and Political Rights, in Article 17, provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>131</sup>

On the regional level, both the European Convention on Human Rights<sup>132</sup> and the American Convention on Human Rights<sup>133</sup> employ "private life" in lieu of "privacy." Article 8 of the European Convention, with a built-in accommodation clause, reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

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128. See notes 120-23 *supra* and accompanying text.

129. See notes 56-58, 84-87 *supra* and accompanying text.

130. Universal Declaration, *supra* note 18, art. 12, U.N. Doc. A/810, at 73-74.

131. Covenant on Civil and Political Rights, *supra* note 23, art. 17, 21 U.N. GAOR, Supp. (No. 16) at 55.

132. European Convention, *supra* note 26.

133. American Convention, *supra* note 28.

the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>134</sup>

Article 11 of the American Convention states:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.<sup>135</sup>

These provisions, it is clearly agreed, reiterate the long-cherished protections that have been extended to private life in terms of the inviolability of the home, freedom from unwarranted searches and seizures, the integrity of the family life, the secrecy of correspondence through different modalities, protection against unauthorized use of a person's name, identity or likeness, and protection against attacks upon honor or reputation.<sup>136</sup> What is less clear is the potential scope of references that may appropriately be accorded the concept of "privacy" or "private life" in future application. This question has aroused growing attention and interest, as modern technology and the modern corporate machines, governmental and non-governmental, pose increasing threats to the freedoms of individuals and groups.<sup>137</sup>

A number of official and nonofficial clarificatory efforts suggest that "privacy" and "private life" may admit of considerable expansion of their historic references. In his report on privacy prepared

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134. European Convention, *supra* note 26, art. 8, 213 U.N.T.S. at 230. For discussions of the relevant issues, see F. CASTBERG, *supra* note 50, at 138-45; J. FAWCETT, *supra* note 50, at 185-97; "HUMAN RIGHTS AND THEIR LIMITATIONS," *supra* note 27, at 29-33; F. JACOBS, *supra* note 50, at 125-43; Danelius, *A Survey of the Jurisprudence Concerning the Rights Protected by the European Convention on Human Rights*, 8 HUMAN RIGHTS J. 431, 452-57 (1975); Robertson, *The Promotion of Human Rights by the Council of Europe*, 8 HUMAN RIGHTS J. 545, 554-65 (1975).

135. American Convention, *supra* note 28, art. 11, 9 INT'L LEGAL MATERIALS at 105.

136. See U.N. Report on Privacy, *supra* note 80, at 19-26. See generally H. GROSS, *PRIVACY—ITS LEGAL PROTECTION* (1964); Greenawalt, *The Right of Privacy*, in *THE RIGHTS OF AMERICANS* 299 (N. Dorsen ed. 1971).

137. See notes 70-80 *supra* and accompanying text.



in 1973 at the request of the General Assembly,<sup>138</sup> the Secretary-General of the United Nations, without attempting to elaborate "a concise international definition of privacy"<sup>139</sup> or to "spell out in detail the components which make up the right to privacy,"<sup>140</sup> makes the observation that

the very existence of an internationally-recognized right to privacy presupposes agreement that there are certain areas of the individual's life that are outside the concern of either governmental authorities or the general public,

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138. U.N. Report on Privacy, *supra* note 80. The Proclamation of Teheran, adopted by the International Conference on Human Rights in 1968, declared:

While recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention . . . .

United Nations, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, at 5, U.N. Doc. A/CONF.32/41 (1968) [hereinafter cited as Final Act]. The Conference proceeded to urge the undertaking of a study on the question of human rights and scientific and technological developments. *Id.* at 12.

Acting upon the recommendation of the Conference, the General Assembly in December 1968 adopted a resolution, urging the Secretary-General to undertake such a study and to prepare a preliminary report for the Commission on Human Rights to consider. It urged that particular attention be paid to the following:

- (a) Respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques;
- (b) Protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and biochemistry;
- (c) Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society;
- (d) More generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity.

G.A. Res. 2450, 23 U.N. GAOR, Supp. (No. 18) at 54, U.N. Doc. A/7218 (1968).

Subsequently, the preliminary report prepared by the Secretary-General, U.N. Docs. E/CN.4/1028, Add. 1-6 and Add. 3/Corr. 1 (1970), was considered by the Commission on Human Rights at its 27th Session in 1971. In its Resolution 10 (XXVII) of 18 March 1971, the Commission requested the Secretary-General to continue his study on the impacts of scientific and technological developments on human rights.

The U.N. Report on Privacy, *supra* note 80, is the first of a series of reports prepared by the Secretary-General under the mandate of G.A. Res. 2450, as reinforced by the Commission on Human Rights. For further details, see U.N. Report on Privacy, *supra* note 80, at 4-8; United Nations, United Nations Action in the Field of Human Rights 118-19, U.N. Doc. ST/HR/2 (1974). For other related documents in the series on "Human Rights and Scientific and Technological Developments," see U.N. Doc. E/CN.4/1141 (1973); U.N. Doc. E/CN.4/1142 (1972); U.N. Doc. E/CN.4/1142/Add.1 (1974).

139. U.N. Report on Privacy, *supra* note 80, at 13.

140. *Id.*

areas which may vary in size from country to country but which do possess a common central core.<sup>141</sup>

Underscoring that the exercise of the right of freedom of information and of expression "must not be allowed to destroy the existence of" the right to privacy under Article 8 of the European Convention,<sup>142</sup> the Declaration on Mass Communication Media and Human Rights, adopted in 1970 by the Consultative Assembly of the Council of Europe, affirmed:

The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, nonrevelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.<sup>143</sup>

In a colloquy held in 1970 by the Council of Europe and the Belgian universities to study the content of Article 8 of the European Convention, different aspects of the problem concerning respect for private and family life, home and correspondence, were thoroughly explored.<sup>144</sup> The participants generally took a very broad view of the sphere of private life. Henri Rolin as President of the European Court of Human Rights, gave this summation:

Private life has seemed to us to be a concept which covers a very wide field. Various members expressed the view that it must be taken to include protection against attacks on physical or moral integrity, moral or intellectual freedom, on honour or reputation, protection against the improper use of one's name or image, against activities for the purpose of spying or keeping a watch on or harassing persons, and against divulging information covered by professional secrecy.<sup>145</sup>

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141. *Id.*

142. EUR. CONSULT. ASS., Res. 428 (1970), in COLLECTED TEXTS, *supra* note 37, at 908, 910.

143. *Id.* at 911.

144. PRIVACY AND HUMAN RIGHTS (A. Robertson ed. 1973) [hereinafter cited as PRIVACY AND HUMAN RIGHTS].

145. Rolin, *Conclusions*, in *id.* at 425.

Professor Rolin also noted that "the colloquy achieved a very wide consensus in favour of the view"<sup>146</sup> that Article 8 of the Convention protects against encroachments from both governmental and non-governmental sources.<sup>147</sup>

Similarly, the Nordic Conference on the Right to Privacy of 1967, attended by many jurists from different parts of the world, concluded with a note that projected a relatively comprehensive view about privacy.<sup>148</sup> Among its "Conclusions" was this statement:

The Right to Privacy is the right to be let alone to live one's own life with the minimum degree of interference. In expanded form, this means:

The right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence . . . .<sup>149</sup>

It would thus appear that even in the absence of "a concise international definition of privacy,"<sup>150</sup> existing transnational prescriptions concerning privacy or private life are undergoing an expansion in general community expectation that will permit their application to many important emerging threats to civic order.

The growing transnational concern for the protection of privacy is further manifested, and fortified, by efforts within many national communities. The intense and widespread involvement ramifies far beyond the field of informational privacy. The acute sensitivity aroused by the spread of sophisticated modes of surveil-

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146. *Id.* at 428.

147. *Id.*

148. *Nordic Conference on the Right to Privacy*, 31 BULL. INT'L COMM'N OF JURISTS 1 (1967).

149. *Id.* at 2.

150. U.N. Report on Privacy, *supra* note 80, at 13.

lance comes at a time when people generally share an ever-deepening sense of powerlessness and of loss of individuality as they experience the grip of enormous corporate organizations, both governmental and non-governmental.<sup>151</sup> Demands asserted in the name of privacy have, in fact, extended far beyond privacy in the restricted sense of control over information about oneself. "Privacy" is quickly becoming the potent catch symbol for a constellation of demands which, functionally, are demands for civic order—for the utmost practicable freedom of choice in the shaping and sharing of aggregate values. Despite the not inconsiderable controversy involved in its delimitation,<sup>152</sup> the contemporary renaissance of the right of "privacy" has already generated a far-reaching beneficent effect upon the protection of the basic right of respect.

These developments are most dramatically exemplified by recent trends in the United States. The Supreme Court, in a series of decisions, has expounded and upheld the protection of privacy in such a degree that for all practical purposes the right of "privacy" is becoming a functional equivalent of what we call "civic order." From the well-worn article by Warren and Brandeis in 1890,<sup>153</sup> through Justice Brandeis' celebrated dissent espousing "the right to be let alone" in *Olmstead v. United States* in 1928,<sup>154</sup>

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151. See notes 70-80 *supra* and accompanying text.

152. See notes 56-58 *supra* and accompanying text. See also note 169 *infra*.

153. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It has become a ritual for commentators, in discussing the right to privacy, to begin by paying tribute to this pioneer article. It was of course an innovation in its time. The authors proposed freedom from unwanted communication. Their occasional reference to the right "to be let alone," *id.* at 195, as borrowed from Judge Cooley, embodied a broader conception, close to autonomy. *Id.* at 198-214. This reference has the germ of what we mean by civic order.

At its time the article was innovative also in its suggestions for remedy—through tort or criminal law. What the contemporary observer can add is the possibility of protection and implementation as a human right. Attempts to find relevant tort and criminal law are not enough. These efforts need to be integrated in a comprehensive human rights program.

154. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In this case, Justice Brandeis, contrary to the opinion of the Court, took the position that wire-tapping, though involving no physical invasion, was in violation of the fourth and fifth amendments of the Constitution. In his words:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the

to the decision of *Griswold v. Connecticut* in 1965,<sup>155</sup> the right to privacy has come to vigorous life.

In *Griswold*, the Supreme Court held unconstitutional, as applied to a married couple, a Connecticut statute forbidding the use of contraceptives, because it intruded upon the right of marital privacy, an aspect of a more general constitutional right of privacy. In formulating a general right of privacy, Mr. Justice Douglas, speaking for the Court, emphasized that "the zone of privacy [is] created by several fundamental constitutional guarantees,"<sup>156</sup> as "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>157</sup> Thus conceived, the zone of privacy is, directly or peripherally, protected by the first, third, fourth, fifth, ninth, and fourteenth amendments.<sup>158</sup> Justice Douglas observed that the Court was dealing with "a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."<sup>159</sup>

The separate opinion by Mr. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, after concurring in Justice Douglas' opinion, proceeded to an independent ground by applying and reviving the "forgotten" ninth amendment.<sup>160</sup> The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>161</sup> Characterizing the right of privacy as "a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live,'"<sup>162</sup> one that was

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right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Id.*

155. 381 U.S. 479 (1965).

156. *Id.* at 485.

157. *Id.* at 484.

158. *See id.* at 481-86.

159. *Id.* at 486. For an elaboration of this theme, see Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROB. 272 (1966). Although "privacy" is often assumed to be "a distinctly modern notion," Westin asserts that "the modern claim to privacy derives first from man's animal origins and is shared, in quite real terms, by men and women living in primitive societies." A. WESTIN, *supra* note 58, at 7.

160. 381 U.S. at 491.

161. U.S. CONST. amend. IX.

162. 381 U.S. at 494.

"'retained by the people' within the meaning of the Ninth Amendment,"<sup>163</sup> Mr. Justice Goldberg declared that "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."<sup>164</sup> He added:

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.<sup>165</sup>

In their respective concurring opinions, Justices Harlan and White clearly dissociated themselves from the opinion of the Court and invalidated the Connecticut statute simply for having deprived

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163. *Id.* at 499.

164. *Id.* at 492.

165. *Id.* at 491. Justice Goldberg sought, however, to dismiss the idea that "the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government." *Id.* at 492.

In contrast, Emerson observes that "Mr. Justice Goldberg discussed it [the ninth amendment] at length, but his opinion seems to give it a more limited significance." Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 227 (1965). In Emerson's view, "Mr. Justice Douglas' use of the ninth amendment carries a greater potential. Under his theory, the ninth amendment might be utilized to expand the concept of privacy or, perhaps, to guarantee other basic rights." *Id.* at 228. For vindication of Emerson's view, see *Palmer v. Thompson*, 403 U.S. 217, 233-39 (1971) (Douglas, J., dissenting).

For discussion of the potentialities of the ninth amendment, see E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1965); B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956); Franklin, *The Relation of the Fifth, Ninth, and Fourteenth Amendments to the Third Constitution*, 4 HOW. L.J. 170, 174-78 (1958); Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121 (1967); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U.L. REV. 787, 804-10 (1962); Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1 (1972); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959).

the married couple of " 'liberty' without due process of law,"<sup>166</sup> thereby reinvigorating the doctrine of substantive due process under the fourteenth amendment.<sup>167</sup> Justices Black and Stewart dissented on the grounds that the so-called "right of privacy" found no support in the specific guarantees of the Bill of Rights and that the Court, in interpreting the due process clause of the fourteenth amendment, must refrain from inventing a new right not grounded in the specific guarantees of the Constitution.<sup>168</sup>

Although the precise source of the right of privacy was a matter of contention among the Justices and has since become a favorite subject of continuing debate among commentators,<sup>169</sup> the importance of the *Griswold* decision cannot be overemphasized. *Griswold* established for the first time a generic right to privacy protected under the Constitution in what had been an ambiguous situation. It matters little whether the right is derived from the first, third, fourth, fifth, ninth or fourteenth amendments, or from customary expectations that have clustered around the original words. "Penumbras, peripheries, emanations, things fundamental and things forgotten,"<sup>170</sup> or whatever, the important fact is that the Court created constitutional protection for an important human right and stated that right in broad terms. Thus, with *Griswold*, community expectations for greater freedom of choice have been strengthened, notwithstanding the Court's initial difficulties in finding appropriate justification for the right and the absence of a clear projection of the perimeter of the zone of privacy.

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166. 381 U.S. at 502.

167. See *id.* at 499-502 (Harlan, J., concurring in the judgment); *id.* at 502-07 (White, J., concurring in the judgment).

168. See *id.* at 507-27 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting).

169. See S. HUFSTEDLER, *THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY* (1971); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807 (1973); *Comments on the Griswold Case*, 64 *MICH. L. REV.* 197 (1965); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Greenwalt, *Privacy and Its Legal Protections*, 2 *HASTINGS CENTER STUDIES* 45 (1974); Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410 (1974); Heymann & Barzelay, *The Forest And The Trees: Roe v. Wade And Its Critics*, 53 *B.U.L. REV.* 765 (1973); Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 *YALE L.J.* 638 (1975); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 *N.Y.U.L. REV.* 670 (1973).

170. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 *MICH. L. REV.* 235 (1965). See also McKay, *The Right of Privacy: Emanations and Intimations*, *id.* at 259.

In 1969, in *Stanley v. Georgia*,<sup>171</sup> the Supreme Court outlawed a Georgia statute prohibiting possession of obscene materials in one's own home. Having reaffirmed the constitutional right to "receive information and ideas" under the first amendment,<sup>172</sup> Mr. Justice Marshall, delivering the opinion of the Court, hastened to add that "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."<sup>173</sup>

In 1972, in *Eisenstadt v. Baird*,<sup>174</sup> the Supreme Court held unconstitutional a Massachusetts law which denied unmarried persons access to contraceptives but accorded married persons such access through a registered physician or through a pharmacist acting pursuant to a physician's prescription. Mr. Justice Brennan, delivering the opinion of the Court, held the Massachusetts statute in violation of the equal protection clause of the fourteenth amendment for having distinguished single from married persons in access to contraceptives.<sup>175</sup> In addition, he took the occasion to emphasize that the right to privacy enunciated in *Griswold* is not confined to the marital context. Justice Brennan stated:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>176</sup>

The creative role of the Supreme Court in *Griswold* was reaffirmed and further extended in 1973 in *Roe v. Wade*.<sup>177</sup> In *Roe* the

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171. 394 U.S. 557 (1969).

172. *Id.* at 564.

173. *Id.*

174. 405 U.S. 438 (1972).

175. *Id.* at 446-55.

176. *Id.* at 453 (citation omitted).

177. 410 U.S. 113 (1973).



court invalidated a Texas law banning abortion except on " 'medical advice for the purpose of saving the life of the mother' " <sup>178</sup> on the ground that it violated the right of privacy as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." <sup>179</sup> The trend of decision that fortifies the Court's protection of privacy is succinctly summarized by Mr. Justice Blackmun who spoke for the Court:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford* (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia* (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio* (1968), *Katz v. United States* (1967), *Boyd v. United States* (1886), see *Olmstead v. United States* (1928) (Brandeis, J., dissenting); in the

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178. *Id.* at 118.

179. *Id.* at 153. Mr. Justice Stewart, reversing his previous position in *Griswold*, concurred that Roe's right was clearly "embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 170 (Stewart, J., concurring). In emphasizing the scope of "liberty," he quoted the Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1971): "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." 410 U.S. at 168. He added two eloquent statements by Justices Harlan and Frankfurter:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

*Id.* at 169 (quoting Justice Harlan's dissent from the dismissal of appeal in *Poe v. Ullman*, 367 U.S. 497, 543 (1960)). Justice Stewart continued: "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *Id.* (quoting Justice Frankfurter's dissent in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949)).

penumbras of the Bill of Rights, *Griswold v. Connecticut*; in the Ninth Amendment, *id.* (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska* (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia* (1967); procreation, *Skinner v. Oklahoma* (1942); contraception, *Eisenstadt v. Baird*; *id.* (White, J., concurring in result); family relationships, *Prince v. Massachusetts* (1944); and child rearing and education, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska*, *supra*.<sup>180</sup>

With the decisive stroke of *Roe*, "it is no longer necessary," in the words of Henkin, "to eke out privacy in small pieces as aspects of other constitutional rights; there is now a Constitutional Right of Privacy."<sup>181</sup>

It will be observed that all these cognate terms and verbalisms about privacy reflect a struggle to secure a policy that transcends particular factual contexts and guarantees optimum freedom of choice to human beings. All decisions that protect the utmost freedom of choice in value shaping and sharing—whether justified in terms of privacy, the Bill of Rights, substantive due process, the first amendment, the ninth amendment, the penumbra theory,<sup>182</sup> the incorporation theory,<sup>183</sup> ordered liberty or tort law<sup>184</sup>—contribute to the sum total of free choice for participating in par-

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180. *Id.* at 152-53 (citations omitted).

181. Henkin, *supra* note 169, at 1423.

182. See *Griswold v. Connecticut*, 381 U.S. at 481-86. See also Dixon, *supra* note 56; McKay, *supra* note 170.

183. See Henkin, "Selective Incorporation" In *the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). The gist of the doctrine of "selective incorporation" is that "the fourteenth amendment incorporates specific provisions of the Bill of Rights, and those that are 'absorbed' at all are incorporated whole and intact, providing protections against the state exactly congruent with those against the federal government." *Id.* at 74 (footnote omitted). For an authoritative exposition of this theory, see Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274-76 (1960). See generally Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, *id.* at 140.

184. One of the most influential articles concerning the tort law of privacy is Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). After a comprehensive survey, Dean

ticular value processes. The inclusive, open-ended potentialities that now exist for enlarging the scope of freedom of choice is the very essence of our preferred civic order.

This overriding accent on the freedom of choice that underlies the contemporary protection of privacy is beginning to gain recognition among commentators. Thus, Henkin writes:

It has been insufficiently noticed that what the Court has been talking about is not at all what most people mean by privacy. None of the recent cases, and none of the older cases the Court cited (except those dealing with search

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Prosser concluded that

[t]he law of privacy comprises four distinct kinds of invasion of four different interests . . . .

1. Intrusion upon [a person's] seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about [a person].
3. Publicity which places [a person] in a false light in the public eye.
4. Appropriation . . . of [a person's] name or likeness.

*Id.* at 389. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 802-18 (4th ed. 1971). This fourfold category has been influential not only in the United States, but also in other lands.

A formidable critic of Prosser has argued that there is only one tort, not four separate torts, of privacy. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964). See also Freund, *Privacy: One Concept or Many*, in *PRIVACY*, *supra* note 56, at 182-98; Green, *Continuing the Privacy Discussion: A Response to Judge Wright And Professor Bloustein*, 46 TEX. L. REV. 750 (1968); Kalven, *Privacy In Tort Law—Were Warren And Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966). It would appear that Prosser is correct in indicating that the word "privacy" refers to many different interactions and situations which raise different policy issues. The breakdown of different interactions and situations which Prosser offers is, however, unhappily confined to the acquisition and communication of information about a person. He does not explore the broader interest of a person to be let alone in his choices as regards a wide range of values. Similarly, his concern for remedies is confined to those of tort law, with all the limitations inherent in such law. Nonetheless Bloustein's quarrel would seem largely a matter of words. Whether one says there is only *one* tort of privacy or *four* different torts of privacy is tweedledum and tweedledee. What is important is to note significant differences in facts, relevant policies and appropriate remedies.

Some critics reject the tort, property and trust rationales and analogies in regard to privacy. *E.g.*, A. MILLER, *supra* note 56, at 169-201. The most effective approach would appear to be to accept any legal rationale or analogy that leads to improved human rights protection. The tort, property and trust rationales may in some contexts afford extremely useful protection of human rights. Taken alone, however, they are not adequate. What is needed is to invoke the whole constitutive process of authoritative decision, with all different codes, for improved protection of basic human rights. There is a need, further, not only for improvement in national prescription and administration, but also for improvement in transnational prescription and application.

and seizure under the fourth amendment), which the Justices have now swept together into the basket labeled "right of privacy," deals with any of the matters that are the subject of the now-massive literature on privacy.<sup>185</sup>

In his view, "the Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation,"<sup>186</sup> that is, a right to "autonomy."<sup>187</sup> Elaborating, Henkin adds:

Primarily and principally the new Right of Privacy is a zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment. The zone, Justice Blackmun told us, consists of "personal rights" that can be deemed "fundamental," that are "implicit in the concept of ordered liberty." The right has "some extension" to marriage, sexual relations, contraception, unwanted children, family relations and parental autonomy. But we will know which rights are and which are not within the zone only case by case, with lines drawn and redrawn, in response to individual and societal initiatives and the imaginativeness of lawyers.<sup>188</sup>

In the same vein, Kalven probes "the relationship of privacy to autonomy or freedom"<sup>189</sup> as follows:

Do we value privacy only because it is useful to the strategy of protecting personal freedom or do we value it for its own sake independently of the practical consequences that intrusions into privacy may entail? Does privacy, absent a concern with freedom, reduce to a trivial quaint grievance? My deep personal hunch is that the topic is really freedom and that calling it privacy tends to obscure matters. In *Griswold*, for example, is the griev-

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185. Henkin, *supra* note 169, at 1424 (footnote omitted). For decisions relating to informational privacy, see *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). See also 1 N. DORSEN, P. BENDER, & B. NEUBORNE, *supra* note 80, at 819-45; Schwartz, *Reflections on Six Years of Legitimated Electronic Surveillance*, in *PRIVACY IN A FREE SOCIETY*, *supra* note 75, at 38-55; Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969).

186. Henkin, *supra* note 169, at 1424.

187. *Id.* at 1425.

188. *Id.* at 1425-26.

189. Kalvin [sic], "Privacy and Freedom"—A Review, 23 REC. N.Y.C.B.A. 185, 187 (1968).

ance really the one the Supreme Court selected, namely, the predicted intrusions by police into the bedroom in the effort to enforce the law? Or is the grievance the law's effort to limit man's freedom to decide whether and when he will breed children?<sup>190</sup>

Greenawalt expresses the same insight when he stresses that "autonomy in choice of behavior is the fundamental value and that information control and freedom from intrusion are merely instrumental to autonomy."<sup>191</sup>

Precisely because it is freedom of choice that is at stake in issues involving privacy, Mr. Justice Douglas found it appropriate, in his concurring opinion in *Roe* and its companion case, *Doe v. Bolton*,<sup>192</sup> to reiterate that "a catalogue of" the constitutionally protected rights "includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution."<sup>193</sup> In amplification, he outlined the following comprehensive map of that "Liberty" protected under the fourteenth amendment:

*First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*

These are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. . . .

*Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.*

These rights, unlike those protected by the First Amendment, are subject to some control by the police power. . . . These rights are "fundamental," and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. . . .

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190. *Id.*

191. Greenawalt, *supra* note 169, at 49.

192. 410 U.S. 179, 209 (1973) (Douglas, J., concurring).

193. *Id.* at 210.

*Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.*

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest."<sup>194</sup>

While in the United States the protection of civic order finds increasingly vigorous expression through the expanding right to privacy, comparable protection has been achieved in other legal systems under a "general right of the personality."<sup>195</sup> The policy underlying the protection of the right to the personality is articulated by the Federal Council of Switzerland in these words:

The right to protection of the part of a person's life which is personal and secret is an expression of the conviction that the individual cannot develop his personality unless he is assured of protection from interference with his private life, by the State or by other persons. This is among the rights which, in a liberal juridical order, are recognized as the rights to which every individual is entitled by the very act of being a person. The protection of these rights is one of the duties of the State, based on law.<sup>196</sup>

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194. *Id.* at 211-13 (citations omitted). See also W. DOUGLAS, *THE ANATOMY OF LIBERTY* 1-52 (1963).

Comparable projections of the contours of freedom of choice of course abound in earlier decisions. For example, in 1897, the Court declared:

The liberty mentioned [in the due process clause of the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

*Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). Similarly, in 1923, the Court stated:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

195. See S. STROMHOLM, *RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY: A COMPARATIVE SURVEY* (1967) (Working Paper prepared for the Nordic Conference on Privacy organized by the International Commission of Jurists, Stockholm, May 1967).

196. Quoted in U.N. Report on Privacy, *supra* note 80, at 14.

The development of this new right is epitomized in the Federal Republic of Germany. The long acknowledged right of the personality under the German Civil Code<sup>197</sup> was greatly strengthened when the Constitution of 1949 formally provided for the protection of "the free development of one's personality" as a fundamental right. Article 2 reads:

1. Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.
2. Everyone shall have the right to life and to inviolability of his person. The freedom of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law.<sup>198</sup>

This doctrine, under "the energetic affirmations"<sup>199</sup> of judicial decisions and scholarly opinions, exhibits an "inexhaustible character"<sup>200</sup> in that it is left so open-ended as to embrace a wide range of protected rights.

The rights protected under this general right of the personality have been divided into three major categories by German jurists:

(1) the "right to develop one's personality:"<sup>201</sup> "the general freedom of action, the freedom of work, the right of pursuing a professional, commercial or cultural activity, the freedoms of association, expression, religious and moral activities and education;"<sup>202</sup>

197. Two particularly relevant provisions are Articles 823 and 826 which read:

Article 823. I. One who, intentionally or negligently, wrongfully injures the life, body, health, freedom, property or any other right of another is obligated to compensate him for damage arising therefrom.

II. One who violates a provision of law intended to protect another incurs the same obligation. If the wording of the provision makes possible its violation without fault, liability for compensation arises only in the presence of fault.

Article 826. One who intentionally damages another in a manner violating good morals is obligated to compensate him for such damage.

*Translated and quoted in Krause, The Right to Privacy in Germany—Pointers for American Legislation?*, 1965 DUKE L.J. 481, 518. See also S. STROMHOLM, *supra* note 195, at 54-58.

198. Basic Law of the Federal Republic of Germany, May 8, 1949, as amended to January 1, 1966, in 3 CONSTITUTIONS OF NATIONS 361-62 (A. Peaslee rev. 3d ed. 1968).

199. S. STROMHOLM, *supra* note 195, at 58.

201. *Id.* at 55.

202. *Id.*

(2) the "right to defend one's personality:"<sup>203</sup> "the protection of a person's life, body and health, the protection of intellectual property, the protection of the free will, of a person's feelings and personal relations;"<sup>204</sup> and

(3) the "right to defend one's individuality."<sup>205</sup> This refers to "the protection of three distinct spheres,"<sup>206</sup> that is, the "sphere of individuality,"<sup>207</sup> the "private sphere,"<sup>208</sup> and the "sphere of intimacy."<sup>209</sup> The rights protected under the first sphere include "the right to a person's name" and "likeness,"<sup>210</sup> the "right to a person's honour and reputation,"<sup>211</sup> and "the right to have one's descent established."<sup>212</sup> The "sphere of intimacy"<sup>213</sup> is distinguished from the "sphere of privacy"<sup>214</sup> in that the former refers to "protection against any person trying to have access to letters, diaries, personal notes or, more generally, any facts which a person has a reasonable interest in keeping secret,"<sup>215</sup> and the latter refers to protection "against any prying into, surveillance of and disclosure of private facts, independently of their character."<sup>216</sup>

In France, it has been established that "the notion of *droits de la personnalite* is far wider than that of privacy."<sup>217</sup> Professor Nerson, a leading authority in the field, in urging that "the list of personal rights" be "left open,"<sup>218</sup> has observed that the right of the personality is designed to protect:

(1) "interests in the notion of individuality:"<sup>219</sup> "the interests relating to a person's name, domicile, status, legal capacity and profession;"<sup>220</sup>

(2) "interest" in "bodily integrity;"<sup>221</sup>

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203. *Id.*

204. *Id.* at 55-56.

205. *Id.* at 55.

206. *Id.* at 56.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 57.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 49.

218. *Id.* at 51.

219. *Id.* at 50.

220. *Id.*

221. *Id.*



(3) interests relating to moral elements of the personality: "the right to a person's likeness, to secrecy and honour, the moral rights of authors, rights to personal or family *souvenirs*, family tombs and the rights of family law in general."<sup>222</sup>

The conclusion would, thus, appear clear that the fuller protection of a civic order—in the sense of rights to the utmost freedom of choice and personal autonomy—is emerging, both transnationally and nationally.<sup>223</sup>

222. *Id.*

223. See THE YOUNGER REPORT, *supra* note 56, at 23-30, 308-26; U.N. Report on Privacy, *supra* note 80, at 10-54; PRIVACY AND THE LAW (1970) (A Report by Justice, i.e., the British Section of the International Commission of Jurists); Brittan, *The Right of Privacy in England and the United States*, 37 TUL. L. REV. 235 (1963); Dworkin, *The Common Law Protection of Privacy*, 2 U. TASM. L. REV. 418 (1967); Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203 (1931); Storey, *Infringement of Privacy and its Remedies*, 47 AUSTL. L.J. 498 (1973); Walton, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 219 (1931); Weeks, *Comparative Law of Privacy*, 12 CLEV.-MAR. L. REV. 484 (1963); Yang, *Privacy: A Comparative Study of English and American Law*, 15 INT'L & COMP. L.Q. 175 (1966).

Although the concept of civic order or its functional equivalent could be developed to meet any particular problems associated with informational privacy, demands are insistent in many communities, especially highly industrialized ones, that more detailed prescription be formulated to deal with manifold problems arising from increasing technological and corporate threats to informational privacy. On the global level this concern is manifested in the United Nations effort to consider the question of human rights and scientific and technological development. See note 138 *supra*.

Regionally, it is exemplified by Resolution (73) 22 on "the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector," adopted by the Committee of Ministers of the Council of Europe on 26 September 1973. COUNCIL OF EUROPE, PROTECTION OF THE PRIVACY OF INDIVIDUALS VIS-À-VIS ELECTRONIC DATA BANKS IN THE PRIVATE SECTOR (1974). Other examples include the European colloquy on privacy and the Nordic Conference on Privacy. See notes 144-49 *supra* and accompanying text.

On the national level, the United States offers an excellent example. Intense demands for new prescriptions protecting informational privacy are dramatized by the proliferation of privacy bills introduced before the Congress. Senator Jackson gives this summation:

The Ninety-Third Congress, which ended in December, has been referred to as the "privacy" Congress because of the legislation it grappled with—over two hundred bills—in an attempt to regain for each person the right to privacy, the right to know what information is being kept, and thus the right to make choices about his or her life. The bills covered a wide area, including Army surveillance, government record-keeping, criminal-arrest records, federal employees' polygraphs, the Census, financial records, mailing lists, freedom of information, social-security numbers, a privacy commission, income-tax returns, and telephone communications.

Jackson, *Privacy and Society*, THE HUMANIST 30 (May/June 1975). Of the statutes that have been enacted to date, the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat.

#### IV. THE FUTURE OF HUMAN RIGHTS IN PUBLIC AND CIVIC ORDER

The degree to which effective application of the existing prescriptions for the establishment and protection of civic order can be secured will depend in large measure upon how human rights in general are protected and fulfilled, and how effectively the constitutive processes of authoritative decision are mobilized on behalf of the necessary policies. We have emphasized the mutual dependence of public and civic order throughout the world community. The institutions specialized to public order can be expected to exert a decisive impact on the freedoms of choice which are exercised in the civic sector. The scope of these freedoms may be wide or narrow. In turn, any commitment of public order to human rights cannot continue unless the civic order is devoted in theory and practice to these fundamental policies.

As it is often somewhat loosely phrased, the goals of a free society depend upon maintaining a vital balance between the spheres of governmental and civic activities. In previous pages we have sought to delineate these relationships with some precision, particularly the interplay between basic allocations of authorized power and the demands, expectations and identities of the innumerable individuals and groups who comprise the world body politic. If the future is to move toward a commonwealth of human

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1896, effective December 31, 1974, is of paramount importance. In brief, the law provides individuals "the right to know they are the subjects of a file, to examine its contents, to challenge its contents, and to correct inaccurate, incomplete, or out-of-date information." Jackson, *supra*, at 31. Mention may also be made of the Fair Credit Reporting Act of 1970, 15 U.S.C. §§ 1681-1681t (1970), which is designed to eradicate abuses in buying and selling of personal information. To facilitate control over the flow of personal information, the Act accords individuals access to their files in consumer reporting agencies and creates a procedure for the correction of errors. See generally *Fed. Data Banks, Computers and the Bill of Rights, Hearings Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); *Computer Privacy, Hearings Before the Subcomm. on Ad. Prac. and Proc. of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968); *Retail Credit Co. of Atlanta, Ga., Hearings Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 90th Cong., 2d Sess. (May 16, 1968); *The Computer and Invasion of Privacy: Hearings Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 89th Cong., 2d Sess. (July 26-28, 1966); Goldwater, Jr., *Bipartisan Privacy*, 1 CIV. LIB. REV. 74-78 (Summer 1974).

On comparable efforts in other territorial communities, see THE YOUNGER REPORT, *supra* note 56; PRIVACY AND COMPUTERS, *supra* note 56; U.N. Report on Privacy, *supra* note 80, at 41-54; S. STROMHOLM, *supra* note 195, at 167-77; Dworkin, *The Younger Committee Report on Privacy*, 36 MOD. L. REV. 399 (1973).

dignity it will be necessary to sustain and to extend a dynamic equilibrium of forces between public and civic order on behalf of human rights.

It is apparent from the past that a crucial factor is the expectation of violence. In our interdependent yet divided world, if expectations of violence continue to escalate, strong demands in support of coercive public order will persist, and the resulting expansion of government operations will in all probability restrict the scope, and cripple the vigor, of civic order. On the other hand, if expectations of large-scale violence are reduced, the scope of civic order will be relatively inclusive, differentiated and determined to hold its own. For instance, coalitions of governmental and civic forces will modify either public or private monopolies that adversely affect the aggregate pattern of choice.

In passing we note that although the probable future of military and police activities shows little prospect of their diminishing, no one can justifiably insist that his image of tomorrow is infallible. Common awareness of peril can be expected to sustain a sense of urgency among all who exert any significant influence on public and civic decisions and choices throughout the globe. Human rights would gain from any relaxation in the world military-police arena. Issues relating to human rights provide a cluster of programs capable of arousing intense demand for a more satisfactory quality of life.

Interwoven with the expectation of violence and with other factors influencing human rights is the evolution of science and technology. There are no sure grounds for asserting that science and technology will cease to expand, so long at least as the social process continues to function. The impacts of technological innovation on human rights are complex and contradictory. It is possible to demonstrate for example that the overall effect of technical change on "feudal" societies has been to generalize demands in the name of social justice based on equality of respect for basic human identity. These demands are promoted in societies where the class or caste structure is highly stratified and where social mobility is low. A new division of labor means that operations are diversified in new ways. Among groups the focus of attention is more variegated, and distinctive expectations generate novel demands and identifications. Resulting coalitions are less sanctified by tradition and more open to changes that enlarge the circle of active and effective participants in the process of decision.

These movements do not march in one direction. Some inno-

vations increase the span of knowledge, planning and direction on the part of top elites in governmental, economic, ecclesiastical and other organizations. In turn, centralizing tendencies may be counteracted by decentralizing tendencies and by demands to deconcentrate control at any level of authoritative decision. The civic order may be strengthened as knowledge is more widely shared and activities are effectively executed in new places or by new groups. Tendencies toward a nondifferentiated society, in turn, may promote recentralizing, monopolistic and regimenting trends, with adverse consequences for pluralism and individuality.

As a reminder of dynamic and structural forces, we recall the relationship between monarchy and the development of modern institutions of participatory and limited government. Monarchs were supported against other territorial magnates by expanding commercial, industrial and financial elements of the population. They developed some of the institutions, such as parliaments and constitutional restrictions, that widened the scope of protected choice.

In the next few decades a crucial question is whether science and technology will be made available at creative centers throughout the globe, or whether, in substance, the dominance pattern of today will continue. In no trivial degree the range of choice open to the world's population will depend on shared knowledge conjoined with determination to execute population policies that harmonize with a selected level of resource utilization.

The future vitality of civil order will be deeply affected by the intelligence and strength of private organizations. Since government structures are territorially oriented, they are easily seen as comprehensive and hierarchical. By contrast the civic order is a welter of people and projects. It is no surprise to find that the bureaucratizing tendencies of government are encouraged and that the sheer weight of public order tends to encroach on the social process as a whole. If civic order is to protect itself, it must engage in counter-organizations that mobilize prompt and intense commitment.

Recent and impending communication changes provide tools that may be used for the effective defense of civic order. The expansion of the physical, biological and cultural sciences has already nurtured a vast and growing network of scientists, engineers, technicians and knowledge institutions. Colleges, universities, academies and research bureaus do not necessarily depend on government. Even in countries where these institutions are governmentalized, they usually exhibit degrees of independence that jus-

tifies putting them in a relatively depoliticized sphere. In advanced industrial and pluralistic societies, knowledge institutions coexist with multiple political parties and thousands of interest groups. Specialists in the legal, social and related policy sciences can be drawn upon to assist in formulating policy goals and strategies by every group. If research and storage facilities are accessible, the many participants located in the civic order acquire the cognitive maps necessary to influence public and private choices and decisions. The expanding sciences of culture provide an improving basis for strategies designed to attract the interest of all strata of society in the formation and execution of collective policy. The fundamental implication is that the future of human rights is interdependent with the simultaneous growth of knowledge and commitment.

